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THE
FEDERAL REPORTER.

VOLUME 90.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

DECEMBER, 1898—FEBRUARY, 1899.

ST. PAUL:
WEST PUBLISHING CO.
1899.

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WEST PUBLISHING COMPANY.

FEDERAL REPORTER, VOLUME 90.

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OF THE

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

CROTTS v. SOUTHERN RY. CO.

(Circuit Court, W. D. North Carolina. October 19, 1898.)

1. REMOVAL OF CAUSES—LOCAL PREJUDICE—DISCRETION OF COURT.

The amount and manner of proof required to authorize the removal of a cause on the ground of local prejudice under the acts of 1887 and 1888 must be left to the discretion of the court passing on the application, and after the term has expired at which an order of removal on such ground was made it cannot be reviewed, and the cause remanded, on the ground that the showing was insufficient.¹

2. SAME—NOTICE OF APPLICATION.

No notice to the adverse party of an application to the circuit court for an order of removal is required.

On Motion to Remand.

Bynum, Bynum & Taylor, for plaintiff.

Charles Price, for defendant.

SIMONTON, Circuit Judge. The plaintiff, W. O. Crotts, began his action against the Southern Railway Company in the superior court of Randolph county, in the state of North Carolina. Thereupon the defendant filed its petition before this circuit court of the United States for removal into this court on the ground of local prejudice. The petition in the record is accompanied by the following affidavit:

"G. F. Bason, being duly sworn, says that he is one of the attorneys for the defendant in the above-entitled cause; that he has reason to believe, and does believe, that from prejudice and local influence the defendant will not be able to obtain justice in the superior court of the state of North Carolina for the county of Randolph, or in any other state court to which the said defendant, your petitioner, may, under the laws of the said state, have the right, on account of such prejudice and local influence, to remove said cause; that the grounds for such belief are, among others, that there is a great prejudice in the said county of Randolph, and the other counties adjoining thereto, to which your petitioner might, under the laws of the state, have the right to remove this cause, against the said defendant, the Southern Railway Company; that said prejudice has existed for a number of years,

¹ As to removal of causes on the ground of prejudice or local influence, see note to *Schwenk & Co. v. Strang*, 8 C. C. A. 95.

and does exist at this time, to such an extent as to make it impossible for the defendant to obtain a fair trial in the said superior court of the county of Randolph."

Thereupon the court made the following order in granting the prayer for removal:

"This cause coming on to be heard upon the petition, affidavit, and bond filed herein by defendant under the provision of the acts of congress of the United States, and being heard, and it appearing to the court that the petitioner, the Southern Railway Company, cannot, on account of prejudice and local influence, obtain justice in the superior court of Randolph county, state of North Carolina, where the cause is now pending, it is now, on motion of G. F. Bason, attorney for the defendant, Southern Railway Company, considered and adjudged that the bond filed by the defendant be approved, and that the clerk of this court certify to the said superior court of Randolph county a copy of said petition, affidavit, bond, and of this order filed herein, to the end that the said superior court may proceed no further in this action, and that this action be removed to the circuit court of the United States for the Western district of North Carolina, at Greensboro, North Carolina, and that the clerk of the said superior court of Randolph county certify to this court a transcript of the proceedings in this cause."

The application was wholly *ex parte*. The plaintiff at this term entered his motion to remand the cause. This motion has been heard. It is not accompanied by any affidavits or evidence. It is based wholly upon the insufficiency of the affidavit presented to the court to secure the removal sought. Were the petition and affidavit presented now for the first time to this court, a very different question would be presented than that now before it. The act of congress of 1887-88 changed the law materially as to removal of causes on account of local prejudice. As the law prevailed before that act, the party desiring removal on this ground was required to file his affidavit that he could not get justice in the state court by reason of the existence of local prejudice. Upon the filing of this affidavit, without more, the order of removal was granted. The act requires an affidavit stating that the affiant has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in the state court. Rev. St. § 639. An affidavit following the words of the statute was sufficient. The facts and circumstances need not be stated. *Fisk v. Henarie*, 32 Fed. 421. The act of 1887-88 repealed this section entirely. *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207; *Whelan v. Railroad Co.*, 35 Fed. 849. This act of 1887-88 does not prescribe how the existence of prejudice or local influence must be shown. The language of the act is, "When it shall be made to appear to the said circuit court that from prejudice or local influence he will not be able to obtain justice in the state court." The meaning of the words, "shall be made to appear to the said circuit court," has been the subject of repeated adjudication in the circuit courts of the United States, and has been discussed in the supreme court. There can be no doubt that it must be made to appear to the legal satisfaction of the court; not that it be morally satisfied. In *re Pennsylvania Co.*, 137 U. S. 457, 11 Sup. Ct. 143. There has been some difference of opinion as to what kind of proof is necessary to create such legal satisfaction. It is clear that an affidavit stating that affiant has reason to believe,

and does believe, that such local prejudice exists, is not sufficient for this purpose. *Hakes v. Burns*, 40 Fed. 33; *Short v. Railway Co.*, 34 Fed. 226. In this case Judge Brewer seemed to think that a positive affirmation of the existence of such local prejudice would be sufficient. But the great preponderance of authority is against this latter conclusion. *Southworth v. Reid*, 36 Fed. 451; *Amy v. Manning*, 38 Fed. 536; *Hall v. Agricultural Works*, 48 Fed. 599; *Niblock v. Alexander*, 44 Fed. 306; *Schwenk & Co. v. Strang*, 8 C. C. A. 92, 59 Fed. 209, and 19 U. S. App. 300; *Malone v. Railroad Co.*, 35 Fed. 625 (a case in this circuit by Justice Harlan). And this is evidently the opinion of the supreme court as announced by Bradley, J., in *Re Pennsylvania Co.*, supra: "Legal satisfaction requires some proof suitable to the nature of the case; at least an affidavit of a credible person, and a statement of facts in such affidavit which sufficiently evince the truth of the allegation." So, if this matter came up for the first time before this court, presented and sustained only with what is in this record, the petition and affidavit, the course indicated by the cases quoted would be followed, and the removal, probably, would be refused. But that is not the question. The matter has been already before this court, presented to it, considered by it, and acted upon. And it was made to appear to the court then that local prejudice does exist, justifying removal. The term having expired during which the order of removal was granted, this order cannot be reviewed or canceled by the judge then presiding, even were he sitting here. Nor can the court now review and reverse his decision. The amount and manner of the proof required in each case, says Mr. Justice Bradley, must be left to the discretion of the court itself. In *re Pennsylvania Co.*, supra. In the present case the court exercised this discretion, and distinctly declares that it appears to the court that the petitioner, the Southern Railway Company, cannot, on account of prejudice and local influence, obtain justice" in the state court. Were this cause now to be remanded, the court could do so only because of error in the former order of this court. It has no such supervising power.

It has been urged that the removal in this cause was granted *ex parte*, without any notice whatever to the plaintiff. No such notice was necessary. *Reeves v. Corning*, 51 Fed. 774; *Adelbert College v. Toledo, W. & W. Ry. Co.*, 47 Fed. 836. The case of *Schwenk & Co. v. Strang*, supra, is, on this point, *obiter dictum*. The motion to remand is refused.

PARKS v. SOUTHERN RY. CO.

(Circuit Court, W. D. North Carolina. October 19, 1898.)

REMOVAL OF CAUSES—LOCAL PREJUDICE—DISCRETION OF COURT.

After the expiration of the term at which an order for removal was made by the circuit court on the ground of local prejudice, such order cannot be reviewed on a motion to remand on the ground that the evidence on which it was based was insufficient.

On Motion to Remand.

D. Schenck, Jr., for plaintiff.
Charles Price, for defendant.

SIMONTON, Circuit Judge. Alice Parks, administratrix of Frank Parks, instituted a suit against the Southern Railway Company in the superior court of Wilkes county, N. C. Thereupon the defendant filed in this court its petition to remove the cause because of prejudice and local influence. The affidavit not only swears to the fact of prejudice and local influence, but it also gives facts as the reasons for the affidavit. This circuit court of the United States, hearing the petition and affidavit, made the following order:

"It appearing to the court from the petition filed in this cause, which petition has been duly sworn to as an affidavit, and also from an affidavit in the cause, that from prejudice or local influence the Southern Railway Company will not be able to obtain justice in the superior court of Wilkes county, in the state of North Carolina, or any other state court to which the said petitioners would or could, under the laws of the state of North Carolina, have the right, on account of such prejudice or local influence, to remove this cause, and that as this local prejudice does exist, they are therefore entitled to have the removal which they seek, it is accordingly ordered that this cause be, and the same is hereby, removed from the superior court of Wilkes county to this court, at Greensboro. That, the bond offered by the petitioner being examined and approved, the clerk of the superior court of Wilkes county is hereby ordered to send a transcript of the record in this cause to the said circuit court, to the October term, 1898, at Greensboro."

A motion is made at this term to remand the cause because of the insufficiency of the affidavit. This case varies from that of *Crotts v. Railway Co.* (just decided) 90 Fed. 1, in that the facts are stated upon which the affidavit is based. The sufficiency of these facts to sustain the affidavit was within the discretion of the court granting the order. It cannot be reviewed here. The learned counsel for plaintiff with eloquence appealed to the court not to cast a slur on the people or the courts of North Carolina by refusing to remand the cause for their decision. No such question exists to embarrass the court. "The prejudice and local influence mentioned in the statute is not merely a prejudice or influence primarily existing against the party seeking a removal. It includes as well that prejudice in favor of his adversary which may arise from the fact that he is long resident and favorably known in the community. * * * And this implication is no unusual reflection on any particular community or persons. On the contrary, it is such a well understood and recognized frailty of human nature that jurisdiction of controversies between citizens of different states was expressly given by the constitution to the national government, and this not only as a means of doing justice, but of facilitating trade and intercourse between the people of the several states, which the constitution, more than for any other purpose, was formed to protect and promote." *Neale v. Foster*, 31 Fed. 53. The motion to remand is refused.

ALLEN B. WRISLEY CO. v. GEORGE E. ROUSE SOAP CO. et al.

(Circuit Court of Appeals, Seventh Circuit. November 11, 1898.)

No. 515.

1. JURISDICTION OF FEDERAL COURTS—SUIT FOR INFRINGEMENT OF TRADE-MARKS—DIVERSE CITIZENSHIP.

To confer jurisdiction on the courts of the United States of a suit for the infringement of a trade-mark at common law, or for unfair trade, there must exist diverse citizenship between the parties, which must appear on the record.¹

2. SAME—SUFFICIENCY OF ALLEGATION.

An allegation that defendants are "inhabitants" of a state is not a sufficient allegation of their citizenship.

3. SAME—NECESSARY ALLEGATIONS.

Where, in a bill to restrain the infringement of a trade-mark at common law, and unfair competition, and also the infringement of a registered trade-mark, there is neither an allegation of the diverse citizenship of the parties, nor a showing that the trade-mark is used upon goods intended to be transported to a foreign country, or used in lawful trade with Indian tribes, a federal court is without jurisdiction.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

This bill is brought to restrain the alleged unlawful use of a trade-mark. It comprehends (a) the case of an infringement of a trade-mark at common law; (b) the case of unfair competition in trade; (c) the case of the infringement of a trade-mark registered under the act of congress of March 3, 1881 (21 Stat. 502). The bill sets out that the complainant is a corporation organized and existing by virtue of the laws of the state of Illinois, and that the George E. Rouse Soap Company, which was originally the sole defendant, is a corporation organized under the laws of the state of Wisconsin. Upon the coming in of the answer of the George E. Rouse Soap Company declaring itself a co-partnership, composed of Nicholas Meyer and George E. Rouse, the bill was amended by inserting "and against George E. Rouse and Nicholas Meyer, as proprietors of said company, and residing and doing business in Green Bay, in the county of Brown and state of Wisconsin, and inhabitants of said district." These persons were thereupon subpoenaed, and appeared to the suit.

The complainant's trade-mark, which is alleged to have been in use since the year 1876, consisted of the words "Old Country," which were stamped upon an ordinary cake of laundry soap, inclosed in a manila wrapper of buff color, with the words "Allen B. Wrisley's (Trade-Mark) Old Country Soap" printed thereon in blue letters, except that the words "Old Country" were in white letters upon a blue ground. The defendants made and sold a laundry soap, using as a trade-mark the words "Our Country Soap," the paper covering having the words "Our Country Soap" printed upon an American shield, the word "Our" being in white letters upon a blue ground, the word "Country" being printed in white and blue lettering transversely upon the shield on red ground, and the word "Soap" in blue letters upon the red and white bars of the shield. The covering which inclosed the soap also had displayed the American flag, and a streamer, with the words "E Pluribus Unum," and the name of the George E. Rouse Soap Company printed in white letters, and "Green Bay, Wis.," in black letters, both upon a red ground. At the hearing upon a motion for preliminary injunction, affidavits were presented pro and con upon the question whether confusion in the sale of the soaps existed, and whether the use of the words "Our Country" upon the soap of the defendants gave opportunity for, and had resulted

¹ As to diverse citizenship as ground for federal jurisdiction generally, see note to *Mason v. Dullaghan*, 27 C. C. A. 298.

in, the substitution of the goods of the defendants as and for the goods of the complainant. The court below denied the motion for a preliminary injunction (87 Fed. 589), holding that, as a mere trade-mark, there was no attempt at disguise, and no likelihood of the one being mistaken for the other by even the casual and inattentive purchaser, reserving till the final hearing the question whether the use of the word "Country" could be appropriated by the complainant, and also reserving, as we understand the opinion, whether a case of unfair trade is presented.

Taylor E. Brow, for appellant.

J. H. M. Wigman, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

We need not determine whether, by virtue of the statute of the United States (21 Stat. 502), a trade-mark registered thereunder can be protected by a court of the United States as a right arising under the laws of the United States, in the absence of diverse citizenship of the parties; nor need we determine whether, assuming such right of jurisdiction, the relief in case of infringement should be limited to the protection of the right in the use of the trade-mark upon goods intended to be transported to a foreign country or in lawful commercial intercourse with an Indian tribe, since no case is made here which would justify us in now passing upon these questions. Beyond doubt, in the case of the infringement of a trade-mark existing at the common law, or in cases of unfair trade, in order to confer jurisdiction upon the courts of the United States there must exist diverse citizenship of the parties, and, as is universally held, that diverse citizenship must appear upon the record. There is here no allegation of the citizenship of either of the individual defendants, and the term "inhabitant" or "resident," it is well settled, does not necessarily imply citizenship, and cannot be substituted for it. *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207.

The case therefore must be treated, in the absence of proper allegations of citizenship, as one between citizens of the same state; and, to bring the case within the provisions of the act of congress referred to, there must be a showing that the trade-mark involved is used upon goods intended to be transported to a foreign country or in lawful commercial intercourse with an Indian tribe. There is a total lack of evidence in this record upon that point, so that we are unable to consider the case as one coming under the act of congress.

It is matter of regret that the case is presented in such shape that we may not inquire into the merits, and determine the propriety of the order appealed from. In view of the frequent declarations of the supreme court that the primary duty of an appellate court of the United States is to ascertain both its own jurisdiction and the jurisdiction of the court below, which must appear upon the record, the failure to aver facts showing jurisdiction cannot be overlooked, even in the absence of objection by the parties. When urged, as it is here, we may not disregard it. We are constrained, therefore, to direct that the appeal be dismissed.

UNION BANK OF RICHMOND, VA., v. BOARD OF COM'RS OF OXFORD,
N. C.

(Circuit Court, E. D. North Carolina. November 11, 1898.)

1. RES JUDICATA—EFFECT OF VOLUNTARY NONSUIT.

A matter is not *res judicata*, though litigated in the courts of a state, and passed upon by its supreme court, where, after such decision is made, and the case remanded, the plaintiff takes a voluntary nonsuit, as permitted by the state law, and no final judgment is entered.

2. FEDERAL COURTS—FOLLOWING DECISION OF STATE COURTS.

In questions belonging to the general domain of jurisprudence, where commercial securities and contracts between citizens of different states are involved, the jurisdiction of the courts of the United States is absolute, and they are not bound by the decision of a state court.¹

3. CONSTITUTIONAL LAW — STATE DECISIONS AFFECTING OBLIGATION OF CONTRACTS.

Under the provision of the national constitution which forbids states to make laws impairing the obligation of contracts, that end can no more be accomplished by judicial decisions than by legislation.¹

4. SAME—MUNICIPAL BONDS—EVIDENCE TO IMPEACH VALIDITY OF STATUTE.

Where, at the time municipal bonds were issued, the law of the state, as established by the decisions of its highest court, was that a copy of an act attested according to law by the presiding officers of the two houses of the legislature, and filed in the office of the secretary of state, was conclusive proof of the enactment and contents of the act, and the act under which such bonds were issued was so attested and filed, no change in such rule by subsequent decisions can authorize the validity of such bonds to be impeached by evidence from the journals of the legislature to show that the act authorizing their issue was not legally passed.¹

5. MUNICIPAL BONDS—ESTOPPEL TO CONTEST VALIDITY—CONSENT JUDGMENT.

Where the officers of a municipal corporation had the power to issue bonds, and after their issue in a suit thereon a compromise judgment was entered by which such bonds were canceled, and new bonds in a smaller amount issued and accepted in their stead, such compromise was within the authority of the officers, and the judgment estops the corporation from making any defense to the bonds issued thereunder on account of any alleged infirmity in the original issue.

This was an action by the Union Bank of Richmond, Va., against the board of commissioners of Oxford, a town of North Carolina, to enforce the collection of municipal bonds.

Shepherd & Busbee and J. S. Manning, for plaintiff.

R. O. Burton, for defendants.

PURNELL, District Judge. The facts agreed present the following case: The town of Oxford was a duly-chartered municipal corporation under the laws of North Carolina, authorized to sue and to be sued, etc., as "the Board of Commissioners of Oxford." In 1891 the general assembly of North Carolina passed an act to incorporate the Oxford & Coast Line Railroad Company, which act passed the senate in compliance with the requirements of the constitution; but in the house, it appears by the journal, the bill passed its second

¹ As to state laws as rules of decision in the federal courts, generally, see note to *Wilson v. Perrin*, 11 C. C. A. 71, and supplementary note to *Hill v. Hite*, 29 C. C. A. 553.

and third reading on the same day, and the ayes and nays were not entered on the journal on either reading. This admission is made with the right reserved to the plaintiff of objecting thereto, unless the court should decide that such impeaching testimony is admissible under the circumstances of this case. An election was held under the act (about which no question was raised) at which a majority of the qualified voters voted for a corporation subscription of \$40,000 of the capital stock of the railroad company, and bonds to that amount were duly issued. In 1892 suit was brought by the railroad company asking for a mandamus against the commissioners of the town of Oxford commanding that body to levy taxes to pay interest coupons of said bonds. This suit was compromised, and a consent judgment entered at July term, 1892, of the superior court of Granville county. Under the compromise and consent judgment, the board of commissioners issued 20 bonds of the denomination of \$1,000 each (in lieu of the \$40,000 bonds issued in 1891), setting out the acts of the legislature, the litigation, and the judgment and decree. These bonds were delivered to the officers of the railroad company in August, 1892, and 16 sold in Richmond, Va., to the plaintiff, for value, September, 1892. The case has been before the supreme court of North Carolina (116 N. C. 339, 21 S. E. 410, and 119 N. C. 214, 25 S. E. 966), and after the opinion in the latter case, as reported, was certified to the superior court of Granville county, the plaintiff took a nonsuit.

This cause was heard on agreed facts, and, as presented, involves two questions: First, how far the decision of a state court binds the federal court as to municipal bonds held by a nonresident purchaser for value; and, second, whether a municipal corporation, acting by its corporate officers, can be estopped to set up the invalidity of such bonds by a consent judgment of a court of competent jurisdiction. The defendants rest their case upon the ground that the supreme court of North Carolina, in a case between the same parties, reported in 119 N. C. 264, 25 S. E. 966, has decided these bonds invalid, because of a failure in the house of representatives to observe the requirements of article 2 of section 14 of the state constitution. The matters involved are *res judicata*, and the federal courts will respect the opinion of the state court. Strictly speaking, under the facts agreed the matter is not *res judicata*, for in the facts agreed it is distinctly stated that the plaintiff in the state superior court voluntarily took a nonsuit, and there was no final judgment. This the plaintiff had a right to do. *Graham v. Tate*, 77 N. C. 120; *Tate v. Phillips*, Id. 126; *Bank v. Board of Com'rs of Town of Oxford*, 116 N. C. 340, 21 S. E. 410. Not being *res judicata*, the question next arises, is this one of those cases in which a federal court should be governed by an opinion delivered by the supreme court of a state? Where there is a well-settled rule of property in a state, or a well-settled line of decisions as to any matter of state law, or the construction of state statutes or state constitutions, the courts of the United States will always respect these decisions, and be governed by them. "It is a settled rule of these courts," as said Justice Swayne, in delivering the opinion of the court in *Gelpcke v. City of*

Dubuque, 1 Wall. 175, "in such cases to follow the decisions of the state courts. But there have been heretofore, as there doubtless will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law because a state tribunal has erected the altar and decreed the victim." The question involved in this case is the validity of certain bonds which the supreme court of North Carolina in a former decision in this identical case (116 N. C. 339, 21 S. E. 410) held to be valid in all essential particulars, and belongs to the domain of general jurisprudence. In this class of cases the supreme court of the United States, in *Talcott v. Pine Grove Tp.*, 19 Wall. 661, says: "The United States courts are not bound by the judgments of the courts of a state where the case arises." The national constitution forbids the states to pass laws impairing the obligation of contracts, and that end can be accomplished no more by judicial decision than by legislation. Were these courts to yield in cases like this, of oscillating opinions, or even decisions of the courts of the respective states, they would abdicate the performance of one of the most important duties with which they are charged, and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent federal judiciary. The authorities to this effect are numerous and uniform. And in most of the cases cited there was a final judgment in the state court, and the matter was res judicata as far as they could make it so. But in the case at bar there is no final judgment, and nothing to prevent a federal court taking jurisdiction of the matter otherwise properly constituted in such court. In questions belonging to the domain of general jurisprudence, where commercial securities and contracts between citizens of different states are involved, the jurisdiction of the courts of the United States is absolute when sought; and these courts must hear and determine such questions independent of the tribunals of the state in which they arise. If this be so, when there is a final judgment the mere publication of an opinion by a state court in a cause where there is no final judgment will not bind the United States courts, or oust them of their jurisdiction. So, when a question falling under the laws or constitution of the United States—a federal question—is presented, the United States courts have a clear jurisdiction, and would fail in the purposes for which they were created, if they did not take jurisdiction, even though their decisions conflict with that of the state court. My conclusion is that there is nothing in the facts agreed to prevent this court hearing and determining the questions involved.

It is well settled that the laws which are in force at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of the contract as much as though they were incorporated in its terms. This principle embraces the acts which affect its validity, construction, discharge, and enforcement, or the remedies under the contract. *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Walker v. Whitehead*, 16 Wall. 314; *Edwards v. Kearzey*, 96 U. S. 595; *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042. And this means that the law as understood and construed by the courts where the contract is made

and to be performed enters into the contract. Chief Justice Taney, in delivering the opinion of the court in *Trust Co. v. Debolt*, 16 How. 432, says: "Indeed, the duty imposed upon this court to enforce contracts honestly and legally made would be vain and nugatory if we were bound to follow those changes in judicial decisions which the lapse of time and the change in judicial officers will often produce; * * * and the sound and true rule is that, if the contract, when made, was valid by the laws of a state as then expounded by all the departments of its government, and administered by its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature, or decisions of its courts, altering the construction of the law." Justice Harlan, delivering the opinion in *Taylor v. Ypsilanti*, 105 U. S. 71, quoting the above opinion with approval, says that this doctrine is no longer open to question in this court. "It has been recognized for more than a quarter of a century, and is an established exception to the general rule that the federal courts will accept or adopt the construction which the state courts give to their own constitution and laws." Several opinions are cited sustaining the view that the construction of the state statute, as far as contract rights acquired under it are concerned, becomes as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment to the law by means of a legislative enactment, and the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper.

Under this principle it becomes of vital importance to know what was the law in North Carolina, as enunciated by the highest court of the state, at the time the contract under consideration was entered into,—1891,—or what was the law of the state affecting such commercial paper in 1892, when the bonds were issued and sold to the plaintiff on the market in another state. It is admitted in the facts agreed that the journal of the house of representatives shows a failure to comply with article 2 of section 14 of the constitution, but "it is understood and agreed that this admission as to what appears on the journal is only to be considered should the court decide that such impeaching testimony is admissible under the circumstances of this case."

There was apparently both legislative and judicial authority, ample and complete, for the issue of the bonds in question; and the supreme court of the state (116 N. C. 339, 21 S. E. 410), in a learned opinion, decided all essential matters in favor of the validity of the bonds. As far as it goes, the law of North Carolina, as understood by the courts and the legal profession, is embodied in that opinion. The act of the legislature and other questions decided therein give validity to the bonds as set forth in the face of the bonds themselves,—the legislative and judicial authority to issue such bonds. The purchaser, of course, should inquire into the power to issue bonds. He saw this set forth in the face of the bond itself; and if he inquired further, or verified the record, either personally or

through an attorney learned in the law, neither would have been wiser or more learned than the supreme court of the state, which court, at February term, 1895, decided in favor of the validity of these bonds. If such purchaser or his attorney examined the act of the legislature, he found it certified to as required by the laws of North Carolina, and published in the volume of the public laws. Was it incumbent on him to look further?

In the same volume (*Carr v. Coke*, 116 N. C. 223, 22 S. E. 16), in a case where it was alleged and offered to be proved by the journals and other evidence that an act of the legislature had passed neither house of the general assembly, but had been certified by the presiding officers, the supreme court of North Carolina held, emphasizing the line of decisions by that court, that, "where it appears that a bill has been duly signed by the presiding officers of the two houses of the general assembly, the courts cannot go behind such ratification to inquire whether it was fraudulently or erroneously enrolled before it had passed the requisite reading by each house." A more extreme case can hardly be imagined,—where the certificate of the presiding officers made law affecting the commercial interests of the state a bill which had not passed either house. The decision, though, was in conformity with what was said by Chief Justice Pearson, speaking for the court, in *Brodnax v. Groom*, 64 N. C. 244: "That the ratification certified by the lieutenant governor and the speaker of the house of representatives makes it a matter of record which cannot be impeached before the courts in a collateral way." To the same effect is *Gatlin v. Town of Tarboro*, 78 N. C. 119, decided in 1878, and other decisions to the same effect. The judges recognized the gravity of the question in *Carr v. Coke*, and there were two dissenting opinions, in which the distinction was drawn between a collateral and a direct attack upon the record; but the majority of the court decided the law as it has always been understood. The courts of the state have adopted the English rule, and acted on the maxim, "*Omnia præsumuntur rite esse acta*," and that more importance is to be attached to the acts of the lieutenant governor, —the second highest officer of the state elected by the people,—as presiding officer of the senate, and the speaker of the house of representatives, than to those of the journal clerk, irresponsible, and with much less at stake in his official acts. At the time these bonds were issued, the law of North Carolina, as construed by the courts of the state, based both upon the ground of public policy and upon the ancient and well-settled rule of law (whatever changes may have taken place since in judicial decision, which can only govern for the future), was that the copy of an act attested according to law by the presiding officers of the two houses of the legislature, and filed in the office of the secretary of state, is conclusive proof of the enactment and contents of the statute of the state, and that such attested copy cannot be contradicted by the legislative journals or in any other manner.

This being the law at the time and place where the contract embodied in the bond was entered into, the defendants are not entitled to the impeaching testimony embodied in the journal of the house of rep-

representatives; and the act of the legislature under which the election was held and the bonds issued must be held to have been passed with all the solemnity and formality requisite to a valid act of the general assembly of North Carolina, and the bonds issued in pursuance of such act are valid, and binding upon the defendants in this cause. To hold otherwise would be to impair by judicial decision the obligation of a contract made in compliance with the law, which the constitution of the United States does not permit.

Second. Is the defendant corporation estopped or bound by the waiver of the defense as to the validity of the bonds by the consent judgment entered in the superior court of Granville county? Consent judgments do not establish principles. They are too often signed as a matter of course, at the solicitation of counsel, and only signify the court consents that litigants may settle their controversy by agreement, make such agreement matter of record, and give to it the dignity of a decree. It will hardly be contended such judgments are not binding inter partes. They are contracts in the most solemn form, sanctioned by the court, and cannot be collaterally attacked. There is no suggestion of fraud, irregularity, or even excusable neglect. But it is argued that because defendant is a municipal corporation, represented by the several defendants named, a consent judgment would not be binding; and as authority for this position *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101, and *Brownsville v. Loague*, 129 U. S. 493, 9 Sup. Ct. 327, are cited. A full discussion of this position would involve the nice distinctions drawn by eminent authorities of definitions, which are sometimes dangerous. Many definitions of a corporation have been attempted. Most of them are too narrow, and many too broad. Most of them include one or more faculties which are not essential. *Kyd, Corp.* 70; *Thomas v. Dakin*, 22 Wend. 70; *Dill Mun. Corp.* (4th Ed.) 18; *Ang. & A. Corp.* 1, 30; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Memphis & L. R. R. Co. v. Railroad Com'rs*, 112 U. S. 609, 5 Sup. Ct. 299. But, disregarding the nice distinctions, all authorities agree the corporation acts by and through its designated officers, one or more, and except where such acts are ultra vires the body is bound thereby. The personnel of the officers may be changed, and the present officers of defendant corporation may be imbued with different ideas or conceptions of the law from their predecessors, but courts can recognize no changes in the personnel of corporate officers. It is a corporate body, with which the courts must deal, and not the officers. If their predecessors acted within the scope of their authority, the present officers would be bound by such action, as would the corporation itself. An examination of the authorities cited in no way conflict with this position. In the first case cited the want of authority in the municipal officers to issue the bonds under consideration appeared in the statute (*Kelley v. Milan*, supra), and in the second case it was an application for a mandamus to compel the levy of a tax, and it appeared that the municipality was without power to levy a tax to pay coupons of municipal bonds which had been declared void (*Brownsville v. Loague*, supra). This last decision is cited and commented on in

Franklin Co. v. German Sav. Bank, 142 U. S. 93, 12 Sup. Ct. 147, which is a strong authority for the position that the judgment of a court having complete jurisdiction of a cause cannot be collaterally attacked. But whether the judgment in the mandamus proceeding, entered in pursuance of a compromise, by consent, in the state court, is an estoppel, or the waiver of the defense of the invalidity of the bonds in that proceeding is binding on the defendant corporation, depends upon the power of the commissioners or municipal officers to issue the bonds originally. True, defendant had its day in court, and waived this defense, and not only consented to final judgment, but the judgment of the court was performed; the bonds have it set out in their face as authority for their issue, in addition to the act of the legislature. This would be binding on defendant corporation and its officers, unless such action was ultra vires. The doctrine of accord and satisfaction does not obtain in North Carolina since the adoption of the Code in 1868. If defendant's officers had the power to issue the bonds originally, the consent judgment would be binding, and an estoppel. If, however, there was a want of power to issue the bonds originally, the consent judgment would not confer the power, or validate the bonds. To put it differently: If the defendants can now go behind the ratification, examine the journal of the house, and that journal shows the conditional admission, the consent decree would not confer power the corporate officers did not possess. In the view now taken of the first question, as a compromise under the Code the consent decree is an estoppel.

A decree will be drawn granting judgment in favor of the plaintiff for the sum of \$4,320, with interest as set forth in the first prayer for relief, and a writ of mandamus will issue to the defendants, the commissioners of the town of Oxford, to levy sufficient taxes to pay this judgment and the costs of this action, to be taxed by the clerk.

FAYERWEATHER et al. v. RITCH et al.

(Circuit Court, S. D. New York. October 22, 1898.)

PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT—TESTIMONY AS TO CONTENTS OF EXECUTED INSTRUMENT.

The reason for the rule which precludes an attorney or counsel from disclosing transactions or conversations between himself and his client ceases as to the contents of written instruments after they have been executed by the client, and neither such general rule nor the statute of New York (Code Civ. Proc. §§ 835, 836) prevents a counsel who prepared a codicil to the will of a client, since deceased, which codicil has been destroyed, from being required to state, if within his knowledge, whether such codicil was executed, and, if so, its contents, though he cannot, under the statute, be required to testify as to the transactions or conversations leading up to its execution.

Application to compel a witness to answer questions certified by the examiner, sitting to take testimony in equity.

One of the issues upon which complainant is seeking to put in proof is as to the destruction of a document, executed by a deceased testator and known

as "the fourth codicil," and complainant is seeking to show the contents of such codicil, which he contends was duly executed by testator in the presence of subscribing witnesses. The witness under examination is the counsel of deceased, who took his instructions for the preparation of the codicil, drew it up, delivered it to the testator, and apparently saw him execute it. Presumably he is able to testify what were the contents of the document (since destroyed), and, so far as appears, no other witness is able to do so. The witness declines to testify to the contents of the document, contending that his lips are sealed as to communications with his client, both by well-recognized principles of jurisprudence and by the statute of the state of New York.

Roger M. Sherman and Wm. Blakie, for the motion.
Joseph H. Choate, opposed.

LACOMBE, Circuit Judge (after stating the facts). It is a sound public policy which provides that an attorney or counsel should not be allowed to testify to any of the transactions or conversations between himself and his client which led up to the preparation of any document. But when the document, be it a will or a contract or what not, has been executed, its contents are no longer confidential, the reason for the rule ceases, and the counsel may as properly testify to the contents as may any other witness who knows such contents.

The statute of the state of New York provides (Code Civ. Proc. § 835) that:

"An attorney or counsellor at law shall not be allowed to disclose a communication made by his client to him or his advice given thereon, in the course of his professional employment."

At the time the cause hereinafter referred to was before the courts the next section (836) provided that:

"Sec. 836. The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or the client."

While the statute stood thus the case of *In re Will of Coleman* came before the court of appeals. 111 N. Y. 220, 19 N. E. 71. Counsel who had prepared the will of deceased under instructions from him, and had subsequently, at his request, signed the attestation clause as witnesses, were allowed to testify to the circumstances attending its execution, including the condition of his mental faculties at that time. This was upon the theory that the request to witness his will was a waiver of the privilege which the statute conferred. The language of the court was broad enough to warrant the finding of a like waiver as to the mere contents of the document in the execution of the instrument by deceased. "It would," says the court, "be contrary to settled rules of law to ascribe to the testator an intention, while making his will and going through the forms required to make it a valid instrument, to leave in operation the provisions of a statute which he had power to waive, but which, if not waived, might frustrate and defeat the whole object of his action." And certainly the whole object of a testator's action would be destroyed if, his executed will being by some accident destroyed, the only witness who could testify to its contents was forbidden to testify thereto. Since the *Coleman Case* the statute (Code, § 836) has been amended so that it now reads.

"Sec. 836. The last three sections apply to any examination of a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. * * * But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto." Laws N. Y. 1893, c. 295.

But even in their present form the two sections (835 and 836), taken together, seem not to be applicable to the cause at bar, provided the testimony sought to be elicited from counsel is strictly confined to a statement of the contents of a document which ceased to be confidential when it was executed. The execution of the document, however, does not make the transactions and conversations between counsel and client which led up to its execution any the less confidential, and as to such transactions and conversations there is no express, or even any implied, waiver. The privilege covers also all conversations and transactions with the client's agent or intermediary.

The witness, therefore, should answer, if he knows, as to whether or not a paper prepared by himself as counsel was in fact signed by deceased in the presence of attesting witnesses, in the form and manner required to constitute a valid publication of such paper as a testamentary document; and if he knows, or as far as he knows, he should state the contents of such published document, if he testify that the document was in fact thus published. The objections to all other questions inquiring as to conversations and transactions with his client or his client's agent, leading up to the preparation and execution of such document, are sustained. The case of *Glover v. Patten*, 165 U. S. 394, 17 Sup. Ct. 411, has not been overlooked, but it does not seem to be controlling to a contrary decision.

TYLER MIN. CO. et al. v. LAST CHANCE MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1898.)

No. 429.

1. INJUNCTION BOND—POWER OF COURT ON DISSOLUTION—JUDGMENT AGAINST SURETIES.

A court of equity, on the dissolution of an injunction, may under its general powers, and in the absence of statutory provisions, have the damages occasioned by its issuance assessed under its own direction, and may render judgment therefor against the sureties as an incident to the principal suit.

2. SAME—RELEASE OF SURETIES—MODIFICATION OF INJUNCTION.

Under the rule that the liability of a surety cannot be extended by implication beyond the express terms of his contract, sureties on a bond given to procure a restraining order, which order required the defendants to cease working a certain portion of a mine, and to refrain from removing or appropriating ore previously taken therefrom, cannot be held liable for damages accruing to defendants after a subsequent order, which continued such restraining order in force, but modified and changed it by permitting the working of the mine, and the disposition of the ore taken therefrom, under regulations prescribed by the court.

2. SAME—DAMAGES RECOVERABLE.

In a suit to enjoin defendant from the further working of a mine beyond the alleged limits of its claim, in which a temporary injunction was allowed, and by a subsequent order the court required the defendant to pump the water from its workings to permit an inspection by complainant's engineers, the complainant is liable on its bond, on a final determination of the suit in favor of defendant, for the cost of such pumping, though continued much longer than was necessary for the making of the inspection, where such continuance was solely by reason of the order, and the complainant itself delayed its examination, and took no steps to have the work stopped.

Appeal from the Circuit Court of the United States for the District of Idaho.

This was a suit in equity to restrain the defendants from working certain mines within the alleged boundary of complainant's claim, and for an accounting for the ore taken therefrom. There was a decree for defendants, and a judgment for damages against complainant and the sureties on its injunction bond, from which they appeal.

John R. McBride, for appellants.

W. B. Heyburn, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The Last Chance Mining Company, having discovered a vein of mineral bearing rock in place in the Shoshone mining district of the state of Idaho, for the purpose of acquiring it, located, under the laws of the United States, a claim thereon, in the form of a parallelogram, 1,500 feet in length and 600 feet in width. Shortly thereafter the Tyler Mining Company, finding a vein of mineral bearing rock in place in a northwesterly direction from the Last Chance location, made a location thereon, in the form of a parallelogram, 1,500 feet in length and 600 feet in width, the southeasterly corner of which overlapped the Last Chance location. Thereafter a piece of mining ground adjoining the Tyler on the southwest, and lying between it and the Last Chance, was located as the Republican Fraction; and adjoining that, and in part overlapping it, were located the Last Chance Fraction and Skookum Fraction claims. The Tyler Company having applied for a patent for its claim, a contest was initiated by the Last Chance Company in the United States land office, resulting in a suit in one of the courts of the state in which the claims are situated, and which culminated in a judgment establishing the right of the Last Chance Company to that part of the Tyler location that overlapped the prior location of the Last Chance Company. Thereupon the Tyler drew in its southeasterly end line so as to avoid the conflict, and its claim as so changed was subsequently patented by the government. Both the Tyler and Last Chance claims were extensively mined. The Tyler Company, claiming that its right in and to the vein having its apex within its surface lines, in its dip southerly beyond its side line, was being impinged upon by the underground working and mining thereof by the Last

Chance Company, and by the owners of the Republican, Skookum, and Last Chance Fraction claims, commenced an action of ejectment in the court below against the Last Chance Company, the Idaho Mining Company (owner of the Skookum and Last Chance Fraction claims), the Republican Mining Company (owner of the Republican Fraction claim), and several individual defendants, to recover the possession of the vein so claimed by it, together with damages in the sum of \$200,000, the alleged value of the ore therefrom averred to have been unlawfully extracted and appropriated by the defendants to the action. The action was subsequently dismissed as to the individual defendants. In aid of that action at law, the Tyler Company at the same time, or immediately thereafter, filed in the same court the present bill in equity against the same defendants, alleging the same rights on its part, and similar unlawful acts on the part of the defendants to the bill, and, alleging the threats of the defendants to continue the mining and appropriation of the ore from the vein to which the complainant alleged title, prayed, among other things, the equitable interposition of the court restraining the defendants from mining and appropriating that ore, and a decree establishing the alleged rights of the complainant against the defendants.

The action at law was tried several times. At the first trial, in the circuit court, judgment was rendered in favor of the Last Chance Company, and against the Republican and Idaho Mining Companies, neither of which sued out a writ of error therefrom. The Tyler Company sued out a writ of error to this court, and the judgment in favor of the Last Chance Company was reversed. *Tyler Min. Co. v. Last Chance Min. Co.*, 4 C. C. A. 329, 54 Fed. 284, and 7 U. S. App. 463. Upon the second trial in the court below, judgment was rendered in favor of the Tyler Company against all of the defendants to the action. The Last Chance Company then sued out a writ of error to this court, and the judgment of the circuit court was affirmed. *Last Chance Min. Co. v. Tyler Min. Co.*, 9 C. C. A. 613, 61 Fed. 557. The case was then taken, on the application of the Last Chance Company, upon writ of certiorari, to the supreme court, where the judgments of this court and of the circuit court were reversed, and the cause remanded to the latter court, with instructions to grant a new trial. 157 U. S. 683, 15 Sup. Ct. 733. The judgment of this court was reversed solely upon the ground that it did not give the proper effect to the judgment of the state court of Idaho establishing priority in favor of the Last Chance location. Upon the third trial of the law case in the circuit court, judgment was rendered in favor of the Last Chance Company for its costs. Writs of error were sued out of this court both by the plaintiff and the defendant Republican Mining Company to have that judgment reviewed, and resulted in its affirmance. *Mining Co. v. Sweeney*, 24 C. C. A. 578, 79 Fed. 277. Both the district and circuit judges being absent from the district at the time of the filing of the bill in equity, it, together with certain affidavits, was presented by the complainant to Justice Field, of the supreme court, who thereupon made an order that the

defendants appear before the court at its court room in Boise City, Idaho, on the 5th day of October, 1891, at 10 o'clock a. m. of that day, and then and there show cause why the preliminary injunction prayed for should not issue; and further granting the complainant's application for a restraining order pending such hearing, upon its giving a bond, with two good and sufficient sureties, to be approved by the clerk of the court, in the penal sum of \$20,000, securing the defendants to the suit against all loss or damage which might result from the issuing of the restraining order, if it should be finally determined that the same was improperly issued, or that might be awarded to them by reason of the granting of the restraining order. The bond thus required was executed by the Tyler Mining Company, and by H. B. Eastman, Alf. Eoff, James A. Pinney, and George Ainslie as sureties, and, being approved by the clerk of the court, the restraining order went into effect.

At the time designated in the order to show cause the parties appeared before the court,—the district judge presiding,—with their counsel, and, after a hearing of the matter, the court, on the 9th day of October, 1891, ordered:

That the restraining order "be continued against said Last Chance Mining Company as a temporary injunction pending the trial of the cause, or until otherwise ordered by the court or judge, with the following modifications, to wit: The said Last Chance Mining Company may resume and continue work upon its said Last Chance Mine, and at any place within the limits of its boundary lines projected vertically downward; that all such work shall be done in the usual and ordinary course of mining, in an economical and miner like manner, keeping in view the proper development, the benefit, and preservation of the property; that all ores extracted by such workings shall be stored at some convenient place upon the mine, or they may, as fast as extracted to the amount of the ordinary shipping lot, be shipped and sold, and the proceeds thereof deposited in the First National Bank at Spokane Falls, state of Washington, subject to the regulations hereinafter defined; that, for the purpose of assisting in the enforcement of this order, a competent person shall be appointed as an officer and agent of this court, whose duty it shall be to make such frequent visits to said Last Chance Mine as he shall deem necessary to keep himself fully advised of all the working operations thereof, and observe and report to the court any violation of this order in such operations, and examine all the accounts covering the expenditures and the receipts of such mining operations; that he shall make such arrangements with said defendant concerning the shipping and sale of the ores as he deems necessary to preserve the proceeds thereof as directed by this order, and to that end may require the ores to be shipped jointly in his and defendant's (Last Chance Mining Co.'s) names, and the proceeds deposited in said bank in their joint names; that he shall make arrangements by which, under his supervision, sufficient of such proceeds may be drawn from said bank, from time to time, to meet and pay the actual and necessary working expenses of such mining operations, and all remaining proceeds shall remain in said bank until the court or judge thereof shall direct such officer in the disposition to be made thereof; that said Last Chance Mining Company shall at all times permit such court, officer, or agent to visit and inspect all parts of said mine and its workings, to examine all the accounts, books, and all transactions, as fully as though he had full charge of all such mining operations, and furnish him a copy of all such accounts when he shall demand them."

The order named F. R. Culbertson as such officer of the court; and further provided that the Last Chance Company should within 15 days, or within such time as the parties may agree upon, or the

officer direct, proceed to remove the water from the workings of the Last Chance Company, in order that the same may be examined by the complainant, its witnesses, surveyor, and counsel; and also provided:

"That, at any time the parties affected by this order may agree upon modification hereof, they may act upon such modification, without procuring the formal order of the court approving the same, but no such modification shall be acted upon until the same shall be reduced to writing, and signed by their respective counsel of record; also, it is ordered that a copy of any such modifying agreement must be transmitted to, and filed by, the clerk of this court."

In February, 1892, the first trial of the law action having resulted in a decision in favor of the defendants, the court, on the 9th day of that month, entered this order:

"Ordered that said restraining order be continued as to the defendants the Idaho Mining Company and the Republican Mining Company, and that the same be dissolved as to the defendant Last Chance Mining Company."

On the 6th day of March, 1893,—the second trial of the law action in the circuit court having resulted in favor of the plaintiff,—the court entered this order:

"In this case it is ordered that the injunction heretofore granted by Justice Field be continued as granted by said justice pending the litigation."

The third trial of the law action having resulted in a judgment that the plaintiff recover nothing against the Last Chance Mining Company, which was the principal defendant, that company in May, 1895, upon a petition setting out the various restraining and injunction orders above mentioned, and setting out "that the bond given by the complainant upon the granting of the injunction aforesaid, on the 1st day of September, 1891, became inoperative and void after the dissolution of said injunction, on the 9th day of February, 1892, and is not operative or effectual as to the injunction granted by this court on the 6th day of March, 1893; that the complainant has never given any bond in support of said injunction so granted on the 6th day of March, 1893,"—asked for a dissolution of the injunction ordered on the 6th day of March, 1893, for the failure on the part of the complainant to give a bond. This petition coming on to be heard, the court, on May 27, 1895, made this order:

"It appearing that on March 6, 1893, it was ordered that the injunction heretofore granted by Justice Field be continued as granted by said justice pending the litigation, and it also appearing that it was not then provided for a renewal of the bond before given by the plaintiff, the Tyler Mining Company, and that none has since been given by said plaintiff company, it is now, upon the motion of defendant the Last Chance Company, ordered that the said plaintiff, the Tyler Mining Company, prepare and file with the clerk a good and sufficient injunction bond in the sum of twenty thousand dollars, and that the same be done with all convenient speed, and that the same be submitted to the counsel for the Last Chance Mining Company before being filed with the clerk."

The bond thus required not having been filed, on June 15, 1895, the judge made an order requiring the Tyler Company to show cause, at a designated time and place, "why the injunction heretofore granted against the respondents should not be discharged forthwith, unless

before that day an injunction bond in the sum of twenty thousand dollars be made and filed as heretofore by me ordered to be done"; and on the 28th day of June, 1895, the bond not having been filed, and the Tyler Company having failed to show any cause against it, an order was entered "that the restraining order now existing against the defendants be and is dissolved."

No other proceedings were had or taken in this suit prior to May 26, 1897, on which day the cause was referred to a special master in chancery to take the testimony and report the same, with his findings, to the court. The testimony was so taken, and the master reported it, together with his findings. The latter are to the effect that the issues involved in this suit were conclusively determined in favor of the complainant, as against the defendants Idaho Mining Company and Republican Mining Company, by the judgment of the circuit court made and entered on the 3d day of April, 1896, in the law action, as to all the property in controversy, and as to any vein having its apex within the surface lines of the Tyler claim, found between vertical planes drawn downward through the extended end lines of that claim; that by the same judgment the issues involved in this suit were conclusively determined against the complainant, and in favor of the defendant Last Chance Mining Company, as to all the property in controversy within or beneath its surface lines, and having its apex therein, found between vertical planes drawn downward through its end lines extended, and as to the ore taken therefrom; that by the judgment in the law action the priority of location of the Last Chance claim over the Tyler claim is established; that the extralateral rights of the Tyler claim cease where the vertical plane drawn downward through the north side end line of the Last Chance claim is encountered; and that the Last Chance claim has the extralateral right to follow its ledge to the westward indefinitely upon a plane drawn on its end lines, which end lines are those that intersect the ledge in its course, and were originally located as side lines.

The evidence in the case given before the master, and by him reported to the court below, sustained these findings, and, upon exceptions thereto filed by the complainant, they were sustained by the court. The reasons for these conclusions will be found fully stated in the opinions heretofore referred to. In brief, they are these: Inasmuch as the Republican, Skookum, and Last Chance Fraction claims were located subsequent to that of the Tyler Company, and inasmuch as the vein having its apex within the surface lines of the Tyler location passed through its end lines, that company had the extralateral right conferred by the statute of the United States to follow it in its dip downward, as against any and all subsequent locators, until the planes drawn downward through its end lines, indefinitely extended, are encountered; but inasmuch as the location of the Last Chance claim was prior in time to the Tyler location, and inasmuch as, in point of fact, the vein having its apex within the surface lines of the Last Chance location is shown to be the same vein as that having its apex within the surface lines of the Tyler claim, and in its course passes through

the side lines of the Last Chance location, those side lines became the true end lines, and entitled the prior locator to follow the vein in its dip outside of its original end lines, but really side lines, indefinitely, until the planes drawn downward through its true side lines, extended indefinitely in their own direction, are encountered.

The suggestion of counsel for the appellant that the Last Chance Company, by its pleadings, disclaimed all interest in the vein in question, underneath the surface of the Republican and Last Chance Fraction claims, is not supported by the record. The Last Chance Company did disclaim any interest in either of those claims, but, inasmuch as the vein in question has its apex within the surface lines of the Last Chance location, and in its dip under the true side lines of the Last Chance location passes under the surface of the Republican and Last Chance Fraction claims, it is, in its descent, as much a part of the Last Chance location as if entirely within its surface lines. It constitutes no part of the Republican or Last Chance Fraction claims, and therefore, in disclaiming any interest in those claims, the Last Chance Company did not thereby disclaim any interest in the vein.

The master also found the defendant Last Chance Company entitled to damages and costs by reason of the injunction, the amount of which he fixed at \$14,000, and that the obligors, Eastman, Eoff, Pinney, and Ainslie, on the bond given under the restraining order made in September, 1891, were liable thereon for those damages. Exceptions were filed on behalf of the complainant to these findings, and, except as to the amount, were overruled by the court. The court reduced the amount to \$9,418, for which sum, with interest thereon at 7 per cent. per annum from October 5, 1897, it gave judgment against the complainant and its bondsmen, the latter of whom were not parties to the suit. The present appeal is by the complainant and the bondsmen.

On behalf of the sureties on the bond, it is contended that no decree could be rendered against them because they were not parties to the suit; in support of which position *Bein v. Heath*, 12 How. 168, is cited and relied on, in which case Chief Justice Taney made this remark:

"A court proceeding according to the rules of equity cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction."

In the case of *Russell v. Farley*, 105 U. S. 433, 445, the court reviewed the case of *Bein v. Heath*, as well as the decision of Mr. Justice Curtis in *Merryfield v. Jones*, 2 Curt. 306, Fed. Cas. No. 9,486, and said:

"Upon a careful examination, we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the court of chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The im-

position of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and, having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice, and put an end to further litigation. We are inclined to think that the court has this power, and that it is an inherent power, which does not depend on any provision in the bond that the party shall abide by such order as the court may make as to damages (which is the usual formula in England), nor on the existence of an express law or rule of court (as adopted in some of the states) that the damages may be ascertained, by reference or otherwise, as the court may direct; this being a mere appendage to the principal provision requiring a bond to be taken, and not conferring the power to take one, or to deal with it after it has been taken. But, while the court may have (we do not now undertake to decide that it has) the power to assess the damages, yet, if it has that power, it is in its discretion to exercise it or to leave the parties to an action at law. No doubt, in many cases, the latter course would be the more suitable and convenient one."

Since the intimation in *Russell v. Farley* it has been acted on by the federal courts in at least three cases. *Lea v. Deakin*, 13 Fed. 514; *Coosaw Min. Co. v. Farmers' Min. Co.*, 51 Fed. 107; *Lehman v. McQuown*, 31 Fed. 138. See, also 2 Beach, Mod. Eq. Prac. § 770. Whether or not the bondsmen are entitled to notice is a question not raised by the assignments of error.

But for what did the bondsmen in the present case become liable? The bond was executed, as is expressly recited on its face, to secure the defendants to the suit in which it was given against all costs and damages which might be awarded to it in case the restraining order of September, 1891, should be finally determined to have been improperly issued. That order enjoined the defendants to the suit from working in or on any vein, lode, or ledge having its apex within the surface ground of the Tyler Company, and "from doing any work in the underground workings of the defendants, or any of them, at any point west of a line projected southerly from the southeast corner of said Tyler surface claim, and drawn downward perpendicularly through the earth from that point, or taking any ores therefrom, until the further order of this court, and from in any way interfering with any works, drifts, or excavations of said Tyler Company west of said line, either on the surface or beneath the surface"; and ordered "that, as to any and all ores heretofore mined in the space heretofore specified, by you, said defendants, or any of you, and not removed from said premises, you desist and refrain from removing or appropriating, but that you permit the same to be and remain thereon until otherwise ordered by the court." The sureties upon the bond obligated themselves to pay any damages, not exceeding \$20,000, that might be awarded the defendants to the suit by reason of such restraining order, provided it should be finally decided that the order was improperly issued. The consideration of the bond was the cessation of the work, and desisting from removing or appropriating the ore specified in the restraining order. That obligation could not be added to, nor, indeed, changed, by either party to the suit, nor by the court itself. That sureties are entitled to stand upon the strict letter of their contract is thoroughly well

settled. In *Miller v. Stewart*, 9 Wheat. 680, 701, Mr. Justice Story said:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness."

See, also, *Pickersgill v. Lahens*, 15 Wall. 144; High, Inj. §§ 1636, 1638, 1677. When, therefore, the court, on the hearing in October, 1891, modified the restraining order by permitting the resumption of work under certain specified conditions, it did something which it undoubtedly had the power to do, and which was, perhaps, eminently wise to be done, but for which the sureties upon the bond given upon the issuance of the restraining order in no manner obligated themselves. The court did not require any other or further bond at that stage of the suit, nor was any other bond at any time given on behalf of the complainant.

The only items of damage found by the master to have been sustained by the Last Chance Company between the time of the going into effect of the restraining order and its modification, on the 9th day of October, 1891, were certain costs incurred by it under the rule to show cause, fixed by the master at \$547.50, and allowed by the court below, and certain expenses incurred by the Last Chance Company in the preservation of the property during the time the order as originally granted was in force, the amount of which was fixed by the master at \$1,040, and reduced by the court below to \$600. We see no error in the ruling of the court in respect to these items; but they are the only items of damage for which the appellant bondsmen are liable, as all of the others were sustained by the Last Chance Company under orders of the court for which these bondsmen in no manner obligated themselves.

The appellant company contests the item of \$3,754.50 incurred by the Last Chance Company in pumping water from and cleaning out its levels under the order of the court made at the instance of the Tyler Company, so as to admit of inspection by its officers, attorneys, and witnesses in preparing for the trial of the suit. It is not claimed that no charge therefor should have been allowed, but it is contended that the work was continued longer than was necessary. To this objection the court below answered:

"I do not doubt that it was unnecessary to so long keep these levels open for inspection; all necessary examination should have been made in a short time. I had supposed that it was necessary to keep the water out, that the mine might be worked as permitted by the order of October 10, 1891, but it seems that the defendant continued to keep it out only because so ordered. As the complainant procured this for its own benefit, it should have looked to it that its witnesses make a speedy examination, and then have had the pumping stopped, as it easily might. Instead, it seems to have taken its own time, and have its witnesses make their examination from time to time as convenient. The complainant, and not the defendant, must pay for it."

In this we see no error, nor error in any other ruling of the court below in respect to the costs and damages allowed against the appellant company. The cause is remanded, with directions to the court below to modify the judgment in accordance with the views above expressed.

LAWRENCE v. TIMES PRINTING CO. et al.

(Circuit Court, D. Washington, N. D. October 31, 1898.)

1. EQUITY JURISDICTION — MORTGAGE OF GOOD WILL AND FRANCHISES OF NEWSPAPER—ENFORCING RIGHTS OF PURCHASER.

A sale under a chattel mortgage covering a newspaper plant, and "the circulation, franchises, and good will thereof," vests the purchaser with the right to equitable relief against the mortgagor or its assigns, to the extent of restraining them from using the name of such newspaper, or from publishing and circulating a newspaper by the same or a different name as the newspaper or successor of the newspaper covered by the mortgage.

2. SAME—REMEDY AT LAW.

Books of a newspaper, containing the accounts and names of subscribers and patrons, being articles of which manual possession may be taken, may be recovered in an action at law, and a court of equity is without jurisdiction of a suit for that purpose.

3. JURISDICTION OF FEDERAL COURTS — SUIT IN REM—ASSOCIATED PRESS FRANCHISE.

A so-called "news franchise" of a newspaper, arising out of a contract with the Associated Press for furnishing its dispatches, although such contract provides that the privilege thereby granted may be transferred with the newspaper on condition that the purchaser will enter into a new and similar contract, implies that the assent of the Associated Press must be obtained to the new contract, and is merely a contract, which cannot, by any action of the newspaper, become property or the subject of a suit in rem, so as to support the jurisdiction of a federal court, under Rev. St. § 738.

4. SAME—NECESSARY PARTIES.

To a suit to establish and enforce the right of a purchaser of a newspaper to the Associated Press dispatches, under a franchise or contract held by the former publisher, the Associated Press is an indispensable party, as no decree could be effective which did not bind that corporation; and such a suit cannot be maintained in a federal court in a district of which neither the complainant nor such corporation is a resident or citizen.

This is a suit in equity by George C. Lawrence against the Times Printing Company and the Associated Press. Heard on demurrer to the bill by the Times Printing Company, and a plea to the jurisdiction by the Associated Press.

Ballinger, Ronald & Battle and Donworth & Howe, for plaintiff.

Bausman, Kelleher & Emory and Thomas Burke, for Times Printing Co.

Pratt & Riddle, for the Associated Press.

HANFORD, District Judge. The complainant, a citizen of the state of Iowa, brings this suit against the Times Printing Company, a corporation of the state of Washington, and the Associated Press, a corporation of the state of Illinois. In his amended bill of complaint, the complainant sets forth in detail the history of a daily

newspaper published in the city of Seattle, under the names, successively, of the "Seattle Press-Times," "Seattle Times," "Seattle Evening Times," and "Seattle Daily Times"; but it is sufficient for the purpose of this opinion to state the important facts briefly as follows: On the 9th day of March, 1895, there was a corporation called the "Seattle Press-Times Company," then engaged in the publication of said newspaper, under the name of the "Seattle Press-Times"; and on that day said company, to secure payment of an indebtedness amounting to \$12,000, executed to John Collins a chattel mortgage covering all the printing-office material and appliances, together with the said newspaper plant, and the circulation, franchises, and good will thereof. At that time, the publishing company held a contract entitling it, as a member of the Associated Press, to receive and publish in said newspaper the day news collected by the Associated Press, which contract is in the pleadings called a "franchise." In the contract it is provided that the privilege granted thereby might be transferred with the said newspaper, provided the new proprietor should enter into a new contract with the Associated Press similar thereto. On the 27th of June, 1895, the Seattle Press-Times Company, by amendment of its articles of incorporation, became the Times Company; and on the 4th day of June, 1895, the Times Company entered into a new contract with the Associated Press, which was merely a substitute for the franchise contract previously owned by the company. In the month of June, 1897, a new corporation was organized, called the Times Printing Company, which is one of the defendants herein, said new company having the same officers as the Times Company; and all of said mortgaged property, including the newspaper plant, with its franchises, good will, and circulation, was transferred from the Times Company to said defendant, and again there was a substitution of a new contract between the Associated Press and the Times Printing Company, in place of the franchise contract theretofore held by the Times Company. The chattel mortgage was assigned to one Gilliland, who obtained a decree of foreclosure, and in the month of February, 1898, became the purchaser of all the mortgaged property at a sale thereof made by the sheriff of King county, pursuant to the decree of foreclosure; and the complainant is his vendee and assignee as to said property, with all his rights as purchaser thereof at the foreclosure sale. The defendant the Times Printing Company is in possession of, and withholds from the plaintiff, the books containing the names of subscribers and patrons of said newspaper, and the books of account belonging to said newspaper plant, and is in enjoyment of a monopoly in obtaining and publishing day news under the franchise contract with the Associated Press. The complainant avers that he is the owner and is entitled to have possession of said books of circulation and accounts, and entitled to enjoy the privilege of receiving and publishing the day news furnished by the Associated Press, and that he wishes to continue publication in the city of Seattle of the daily newspaper which was covered by said mortgage. The defendant the Times Printing Company has demurred to said amended com-

plaint, and the other defendant, the Associated Press, has interposed a plea to the jurisdiction. The jurisdiction of the court to adjudicate as to the rights of the parties under the franchise contract with the Associated Press is denied by the demurrer of the Times Printing Company, and also by the plea of the other defendant, on the ground that the Associated Press is an indispensable party; and, as the only ground for invoking the jurisdiction of a federal court is diversity of citizenship, the Associated Press cannot be made a defendant in a suit originally commenced in a United States circuit court, except "in the district of the residence, either of the plaintiff or the defendant."

In their argument in support of the jurisdiction of this court, counsel for the complainant insists that this is not a suit to enforce a personal liability, but rather a suit founded upon a claim to specific property situated within this district, and that the right to bring the suit in this court is given by section 738, Rev. St. U. S., which section provides:

"That when in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear. * * *"

They say that the complainant asserts ownership and legal title to the franchise in question, but that, through the fraud of the respondent the Times Printing Company, the possession and enjoyment of his property rights in this and other valuable things, such as the good will, name, etc., of said newspaper, are unlawfully withheld from him; that the conduct of the Times Printing Company in the particulars alleged in effect places that company legally in the attitude of a trustee ex maleficio, or a transferee under a fraudulent conveyance holding the property for the real owner. Their argument rests upon the proposition that the franchise, the good will, the name, and the circulation of the newspaper are specific articles of property, capable of being transferred and reduced to possession by the acts of the parties, and that said property has a legal situs within this district, and is therefore within the jurisdiction of this court, so that the court may, by its decree, enjoin the mala fide holder from using the same, and also protect the rightful owner in the exclusive use and enjoyment thereof.

As at present advised, I hold to the opinion that, upon the face of the bill of complaint, enough appears to entitle the complainant to equitable relief against the Times Printing Company, to the extent of restraining said defendant from using the name of the newspaper of which the complainant became proprietor by the foreclosure sale, and from publishing and circulating a newspaper by the same or a different name as the newspaper, or successor of the newspaper, which was a substantial part of the property covered by the mortgage.

As to the books containing accounts and names of subscribers and patrons of the newspaper, they are articles of which manual

possession may be taken, and which may therefore be recovered in an action at law. Therefore a court of equity is without jurisdiction to assist the complainant in recovering possession of said property.

As to the so-called "franchise," I find that to be merely a contract creating an obligation and a right, in no wise different in character from any other simple contract by which one party agrees for a consideration to serve another for a definite period. The Associated Press is a news gatherer. Its business is to be diligent in collecting information as to matters of public interest, and to communicate such information as it collects to the publishers of different newspapers promptly. Because of the extensive facilities which it has for gathering news, and its superior facilities for transmitting the same promptly, the right to receive and publish the information which it can supply is valuable to the publisher of a newspaper. It is more valuable than a right which a newspaper might acquire by a contract with one of its individual reporters, securing for a definite period his time and talents, to be devoted exclusively to the work of gathering news, because the Associated Press is an aggregation of reporters; but the difference is in degree, and not in kind. I find no ground in reason nor support in any precedent for the argument that a right to the service of another becomes converted into property which may be the subject of a suit in rem, by any mysterious operation or force emanating from the mere fact that the person obligated to render the service is an artificial being, having a greater number of eyes, ears, legs, and hands than belong to a natural person. It may be fairly inferred from the averments of the bill of complaint, in connection with the substituted contract annexed thereto as an exhibit, that the Associated Press claims the right to pass upon the eligibility of newspaper publishers to become its associates and correspondents, and to become entitled to the privileges granted by the contracts which it makes for furnishing news. It is provided in the contract that the privilege can only be disposed of incidentally with the sale of the newspaper, and upon condition that the purchaser will enter into a new contract of similar import. As a new contract cannot be made without the assent of the parties, this implies that the purchaser may be rejected by the Associated Press, and refused the privileges granted by the contract. Part of the consideration for the service of the Associated Press in furnishing news to a newspaper is the agreement of the publisher of the paper to furnish news to the Associated Press. The association may well say that each contract requires the exercise of its right of choice; for the diligence and faithfulness of one party may be considered a fair compensation for the exclusive right to receive Associated Press news; but the vendee of that party may be entirely incompetent or negligent or unwilling to perform his part of the contract. In its opinion in a somewhat similar case, the supreme court say:

"Apparently the association had the right to accord or deny the privilege of membership as it saw fit, and whether its action in the admission of the new corporation was wholly independent of certificate No. 38, or based upon

the substitution of one share for the other, it would seem to follow, upon the assumption that a membership could be pledged or mortgaged without its consent, that the association was directly interested in the contention raised by the complainant in respect of that action, and that the circuit court was right in holding that the question ought not to be determined in the absence of the association as a party." *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 450, 13 Sup. Ct. 949.

A decree of this court in favor of the complainant will be entirely barren of beneficial results unless the court shall pronounce definitely that the complainant is the only party entitled to receive from the Associated Press, and publish at Seattle, the day news which it furnishes. To so pronounce is the same thing as to decree that the Associated Press is obligated to the complainant to furnish the news to him at Seattle for publication in a newspaper. Logically and legally, the right of one party to receive a benefit from another cannot exist unless the opposite party is obligated to render the benefit. The right and the obligation are so inseparable that, when the obligated party is not within jurisdiction of the court, there can be no such thing as an adjudication in favor of the party claiming a right. If a right to the service of another may be called "property," still it has no physical existence or situs. It cannot be seized or handled by an officer of any court. The only known method by which it can be subjected to judicial process is pressure directly upon, and coercion of, the party obligated to serve; and, of course, the party to be coerced must be caught first. The rule of the federal courts in regard to indispensable parties is well stated by Judge Caldwell in the opinion of the court in the case of *Chadbourn v. Coe*, 51 Fed. 479, as follows:

"Indispensable parties are those who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Shields v. Barrow*, 17 How. 139; *Ribon v. Railroad Co.*, 16 Wall. 450; *Coiron v. Millaudon*, 19 How. 113; *Williams v. Bankhead*, 19 Wall. 563; *Kendig v. Dean*, 97 U. S. 423; *Alexander v. Horner*, 1 McCrary, 634, Fed. Cas. No. 169."

By this rule, the Associated Press is certainly an indispensable party to any proceeding intended to secure to the complainant the rights which he claims under the so-called "franchise contract"; for judgment in his favor must bind the Associated Press, or else leave the question as to the obligation of that corporation to furnish its dispatches to him entirely open and undetermined. As said defendant will not waive its privilege of exemption from being sued in this court by a citizen of the state of Iowa, the court is without jurisdiction to take cognizance of the questions at issue as to the rights of any of the parties under said contract.

The only matter at stake which may be the subject of a controversy within the jurisdiction of this court as a court of equity is the name and good will of the newspaper, and the right of the complainant to restrain the Times Printing Company from the use and enjoyment thereof; but the controversy as to these rights is not cognizable in this court, unless it is claimed that the value thereof exceeds the sum of \$2,000. Until this is made to appear affirma-

tively upon the face of the record, the court is without jurisdiction to proceed.

For the foregoing reasons, both the plea and the demurrer are sustained; and, unless the complainant shall apply for leave to amend the bill, the suit will be dismissed.

KEELYN v. CAROLINA MUT. TELEPHONE & TELEGRAPH CO.

AMERICAN BONDING & TRUST CO. OF BALTIMORE CITY v. SAME et al.

(Circuit Court, D. South Carolina. October 26, 1898.)

RAILROADS—PREFERENTIAL LIENS FOR LABOR AND MATERIALS—TELEGRAPHS AND TELEPHONES.

The doctrine of the federal courts which recognizes the claims of those furnishing labor or supplies necessary to keep a railroad a going concern as entitled to priority of payment over its mortgage indebtedness is applicable to telegraph and telephone lines, which are given the power of eminent domain, and otherwise recognized as important public agencies of modern business and commerce.

Hearing on Claims for Preferred Liens for Labor and Supplies Furnished the Defendant Company.

Mordecai & Gadsden, for employés, etc.

E. W. Hughes, for purchaser.

SIMONTON, Circuit Judge. This case comes up upon claims made by persons who have furnished supplies to the Carolina Mutual Telephone & Telegraph Company and others who have been employed by it. The supplies are of material essentially necessary in keeping up and maintaining the telegraph lines. The employés are ladies who have been employed at the telephone exchange and the superintendent in charge. It is admitted that these employés are not protected under the labor acts of the general assembly of South Carolina. If they can be protected at all, it must be under the doctrine established in *Fosdick v. Schall*, 99 U. S. 235. This was the first of a series of cases which recognize that claims may exist against an insolvent railroad company which are superior to the lien of a mortgage debt. The theory is that railroads are a peculiar property, of a public nature, discharging a great public work. They cannot be built without the interposition of the sovereign power. When built, they serve a great public purpose. Railroads connect distant points. That they are common carriers is but a small part of their office. They are not only the arteries of trade. They civilize, develop, and enrich large sections of country. Cities, towns, and villages, farms and factories, spring up on their line. They make intercommunication of vital importance to thousands. They are the means of transporting troops, munitions of war, and supplies, promoting and preserving tranquility in times of peace, and connecting and creating strategic points in times of war. They are public highways. Public interest—the highest public interest—requires that when constructed they be kept up,—be kept, as the phrase is, a

"going concern." Being so important, the courts look with favor upon everything which keeps a railroad a going concern. To this end, the first application of its earnings must be made. The stockholder subscribes, and the bondholder lends, his money with knowledge of this. Neither of them can get anything until the current expenses are paid. Upon this assurance, all persons who furnish labor and supplies are encouraged to give credit to the railroad and to contribute to keeping it a going concern; and if, perchance, through inadvertence, or for any other cause, any portion of the earnings have been applied to interest or dividends, leaving current expenses unpaid in whole or part, this is a diversion which the court will certainly correct. *Bound v. Railway Co.*, 50 Fed. 314. Such seems to be the doctrine, and the reason for the doctrine, of *Fosdick v. Schall*. Thus far the supreme court has never applied the doctrine in any case except that of a railroad. It certainly cannot be applied to corporations of a purely private character. *Wood v. Deposit Co.*, 128 U. S. 421, 9 Sup. Ct. 131. The question of its application to telegraph or telephone companies has never been made. If we are governed by the reason of the doctrine, its application to a telegraph and telephone company is not difficult. Like railroads, these lines are very important instruments of interstate commerce. They are means of communication between all points on the globe. They are of the most essential importance to the government in time of war and to the people in time of peace. Under the act of congress of 1886, they are made agents of the government, and have its special protection upon certain conditions. This company has complied with these conditions. They can exercise the right of eminent domain. It does appear as if the public have as much interest in keeping a telegraph and telephone company a going concern as they have a railroad company; and so the doctrine laid down in *Fosdick v. Schall*, and the current of cases of which it is the source, would seem applicable also to telegraph and telephone cases.

In the present case it will be extended at least in aid of the operators. They depend for their daily living on their daily wages. They clung to their positions, and stood by the corporation, in despite of failure to secure pay. They, at great sacrifice, kept it a living concern. They enabled it to retain its list of subscribers, so that when it was offered for sale, instead of being an abandoned wreck, it was in active daily operation. The claims of those who furnished supplies are by no means as strong as these. Let an order be taken for the payment of the operators and other employes their wages for 90 days before the appointment of the receiver.

POSTAL TEL. CABLE CO. v. SOUTHERN RY. CO.

(Circuit Court, W. D. North Carolina. October 17, 1898.)

EMINENT DOMAIN—TELEGRAPHS—PROCEDURE—CONSTRUCTION OF STATUTE.

In Code N. C. § 2010, relating to the condemnation of right of way for telegraph lines, and containing the proviso that, "if the right claimed be over or upon an easement or right of way which extends into or through

more counties than one, the whole right and controversy may be heard and determined in one county, into or through which such easement or right of way extends," the words "right of way" are not used as synonymous with "easement," but, as applied to railroads, they include in their meaning the strip of land over which the track is laid through the country, and which is used in connection therewith, whether the railroad company owns only an easement therein or the title in fee.

On Demurrer to Answer.

J. R. McIntosh and A. L. Brooks, for plaintiff.
Stiles & Holladay, for defendant.

SIMONTON, Circuit Judge. The defendant, at the hearing of this case on petition at Asheville, interposed a demurrer to dismiss the complaint, because the facts stated therein disclosed no cause of action. The demurrer was overruled, and an order was made providing for the appointment of commissioners. At a later date, defendant came in, and asked leave to answer, and to this end the order be vacated. The order passed upon overruling the demurrer was based on a construction of the Code of North Carolina of 1883, which left in the discretion of the court the privilege of answering over. This, however, is not in accordance with the law of North Carolina. "After the decision of a demurrer, the judge shall, if it shall appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just." Code, § 272. There can be no doubt as to the good faith of the demurrer. This section has been construed to give the defendant the right to answer over upon overruling the demurrer. *Moore v. Hobbs*, 77 N. C. 65; *Bronson v. Insurance Co.*, 85 N. C. 411. In this last case it was held that it was not proper to interpose the condition that the costs be paid. In *Morris v. Gentry*, 89 N. C. 249, this right to answer over was sustained even after demurrer overruled in the supreme court. The order for the commissioners is vacated, and leave is given to defendant to answer over.

Exercising this right, the defendant has answered. The answer, after setting up very many grounds of defense heretofore passed upon, and therefore now overruled, adds another. It avers that very many sections of the land over which the road runs, and which the petitioner seeks to condemn, are owned in fee simple by the defendant; that thus the petitioner does not seek to condemn a right of way upon an easement only, but it also seeks to condemn the land of defendant. This being so, condemnation proceedings must be had in the county in which the land lies (Code, § 1944); the provision of the Code which authorizes proceedings in one county only applying only to the condemnation of an easement.

The language to be construed is in section 2010 of the Code, and in the proviso. It is in these words:

"Provided that only the interest of such parties as are brought before the court shall be condemned in any such proceedings, and if the right claimed be over or upon an easement or right of way which extends into or through more counties than one, the whole right and controversy may be heard and determined in one county, into or through which such easement or right of way extends."

The petitioner demurs to the answer, and the question of construction must be met. What is meant by the words "easement or right of way"? Are the words "right of way" synonymous with the alternative of the term "easement," or do they mean two different things? Technically and strictly, a "way" is the passage over the lands of another; "right of way" is the right to use this passage. *Williams v. Railway Co.*, 50 Wis. 71, 5 N. W. 482; 21 Am. & Eng. Enc. Law, 405. The position taken by the defendant is very nice and ingenious. It does not create conviction of its soundness; yet it is most difficult to answer. Popularly speaking, the right of way of a railroad company—that which is understood when the term is used—is the track, and that part of land on each side of it, used and possessed for the purpose of passing through the country from one point to another. Anderson, in his *Law Dictionary*, says:

"By right of way is generally meant a private way, which is an incorporeal hereditament of that class of easements in which a particular person, or description of persons, has an interest and a right, though another person is the owner of the fee in the land in which it is claimed; * * * the privilege which one person, or description of persons, may have of passing over the land of another in some particular line. Referring to a railway, a right of way is a mere easement in the lands of others, obtained by lawful condemnation to the public use or by purchase. It is a way over which the company has to pass in the operation of its trains. The term includes land acquired for necessary side tracks and turnouts, and the improvements thereon. It sometimes refers to the mere intangible right of crossing; often, to the strip which the company 'appropriates for its use, and upon which it builds its roadbed.'" *Keener v. Railway Co.*, 31 Fed. 128.

There is another view of this question. The rule in the construction of statutes is to give to every word force and effect. Applying this rule here, we would not, unless forced to do so, conclude that these words mean the same thing,—convey the same idea. The word "easement" would have fully conveyed the idea of an incorporeal hereditament, as distinguished from the fee in the land; and the use of the words "or right of way" would not only be tautological, but confusing. The Code itself uses these words in such a way as to induce the conclusion that they do not convey the same idea. In section 150 it says:

"No railroad, plank road, turnpike or canal company shall be barred of or presumed to have conveyed any real estate, right of way, easement, leasehold or other interest in the soil which may have been condemned or otherwise obtained for its use as a right of way, depot, station house or place of landing by any statute of limitation or by occupation of the same by any person whatever."

So, in this section 2009 of the Code:

"Such telegraph company shall be entitled to the right of way over the lands, privileges and easements of other corporations."

And this section, 2010, uses similar language.

Indeed, it may be questioned if a railroad company organized as a corporation for the specific purpose of running and operating a railroad can have in its right of way any other title except for these purposes, and so long only as they are preserved. 1 Redf. R. R. p. 218, c. 10, § 61. If this be so, the whole right of way is but an easement.

There is yet another view. There can be no doubt that, the right

of eminent domain being a high and at times harsh exercise of the sovereign power, the form of proceeding prescribed by statute must be strictly pursued. The necessity for and the right to its exercise must exist and be shown, and the mode of its exercise must be rigidly followed. At the same time, when it is given for the promotion of a great public benefit, in its use of the gift the corporation should not be harassed and hindered by narrow and technical construction of the words of the statute; nor should such a construction be adopted as will make the gift wholly impracticable and valueless. If this plaintiff be compelled to go into every county through which the railway company has built its way, and there seek the relief it seeks here, its interests will be put into the hands of very many boards of commissioners, whose conclusions would be naturally conflicting, perhaps contradictory. The enterprise of a telegraph company—now one of the necessities of the commercial world—will be delayed, hampered, perhaps defeated. The demurrer to the answer is sustained.

WILMINGTON & W. R. CO. v. BOARD OF RAILROAD COM'RS OF STATE
OF NORTH CAROLINA et al.

(Circuit Court, E. D. North Carolina. October 20, 1898.)

1. EQUITY PLEADING—IMPERTINENCE.

In a bill by a railroad company to restrain the enforcement of an order made by a state railroad commission reducing the rates of passenger fare on complainant's road, on the ground that the rates so fixed are not just and reasonable, allegations that former commissions, and also the present commission, had previously considered the question of rates at different times, and had determined that the rates then in force were just and reasonable, coupled with allegations that there had since been no change in conditions to warrant a reduction of rates, are not impertinent, nor are allegations that the commission, without just ground for discrimination, had not reduced rates on certain other roads.

2. SAME.

In such bill, however, allegations that such reduction in rates was made at the instance of the governor of the state, who was not a member of the commission; that the governor denounced a decision of the supreme court relating to the subject, and induced the commission to make the reduction complained of for the purpose of making a test case to secure the reversal of the ruling in such decision,—are of matters not relevant to the issues, and which could not be proved thereunder, and are impertinent. So long as there is a real, and not a simulated, controversy, it is immaterial by what considerations the commission was influenced in its action.

This is a suit in equity to restrain the enforcement of an order made by the railroad commission of North Carolina reducing passenger rates on complainant's road. Heard on exceptions to the bill.

Junius Davis and R. O. Burton, for complainant.

John W. Hinsdale, W. C. Douglas, and Charles A. Cook, for defendants.

SIMONTON, Circuit Judge. The Wilmington & Weldon Railroad Company, a corporation of the state of North Carolina, filed its bill of
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complaint against the board of railroad commissioners of that state, and L. Campbell Caldwell, John H. Pearson, and De Leon H. Abbott, personnel of said board, and Z. V. Walser, W. J. Leary, W. E. Daniel, E. W. Pou, M. C. Richardson, and H. F. Seawall, Esqs., the first named being the attorney general, and the others solicitors of judicial districts of North Carolina, charged with certain duties under the railroad commission act of the said state. The ground of complaint of the bill is that the said railroad commissioners have imposed upon the complainant certain rates for the carriage of passengers which are not just and reasonable. The prayer of the bill is an injunction to prevent these unjust and unreasonable rates from being imposed.

This case now comes up on a motion to expunge certain passages and parts of the bill as scandalous and impertinent. The equity rules Nos. 26 and 27 seem to contemplate the reference of objections of this character to a master. These, however, are not imperative, and this question can be and will be determined by the court. A bill may contain matter which is impertinent without the matter being scandalous. Story, Eq. Pl. § 270. There is nothing in this bill which is scandalous. Are the charges of impertinence unfounded? Matters in a bill are impertinent when they do not affect or concern the issues involved, when they cannot be sustained by proof which would be relevant, when no evidence with regard to them would be either necessary or proper. In a note to Mitf. Eq. Pl. (6th Am. from 5th London Ed.) p. 48, it is said that the word "impertinent," by the ancient juris consults or law counselors who gave their opinions on cases, was used merely in opposition to "pertinent." "Ratio pertinens" is a pertinent reason; that is, a reason pertaining to the question. "Ratio impertinens," an impertinent reason, is an argument not pertaining to the question." Lord Eldon, in *Ex parte Simpson*, 15 Ves. 476, says: "If that which is stated is material to the issue, it may be false, but cannot be scandalous. If relevant, it is not impertinent, though scandalous in its nature. If relevant and pertinent, it cannot be treated as scandalous. If false, it must be dealt with in another way." "If the matter," says Walworth, Ch., "can have any influence whatever in the decision of the suit, either as to the subject-matter of the controversy, the particular relief to be given, or as to the costs, it is not impertinent." *Van Rennselaer v. Brice*, 4 Paige, 174. "The best test," says Chancellor Kent, "to ascertain whether matter be impertinent, is to try whether the subject of the allegation could be put in issue, and would be matter proper to be given in evidence." *Woods v. Morrell*, 1 Johns. Ch. 103. Or, as put in the same case, facts not material to the decision are impertinent. Extreme caution must be exercised in considering this question, because, if the matter complained of be expunged erroneously, it is irremediable. 1 Beach, Mod. Eq. Prac. § 109.

There are 14 exceptions to the bill because of scandal and impertinence. Each refers to the printed bill, and indicates the exception by referring to lines and parts of lines on pages thereof, not setting out in *hæc verba* the language excepted to. The bill sets forth in detail the action of the predecessors of the present railroad commission, fixing the rate for the carriage of passengers on railroads for

all the roads in the state at 3½ cents per mile for first-class passengers, and 2½ cents for second-class passengers. That these rates were just and reasonable. That the question of their reduction had repeatedly been brought before that board, had been considered by them, and no reduction was granted. That it was again considered by a new board, and, after examination, the rates were deemed just and reasonable. That the question was taken up by the present board, and again examined. After examination the rates were reduced, but this was reconsidered, and the rates were restored, for the reason that they were just and reasonable. That afterwards this board again took up the matter, reduced the rates as to complainant, but refused to reduce them as to the North Carolina Railroad Company, and indefinitely postponed any action as to the Raleigh & Gaston Railroad, notwithstanding the fact that said railroad companies are in as prosperous a condition as complainant. "That there has been no such change in the general condition of affairs or in the business or earnings of complainant or in the existing circumstances as to warrant this reduction or any change of views on the part of the board." These allegations are made the subject of the 1st, 2d, 3d, 5th, 6th, 7th, 10th, 11th, 13th, and 14th exceptions.

The bill also quotes from the inaugural message of his excellency, the governor of North Carolina, in January, 1897, an expression of opinion that the passenger rates prevailing in the state were just and reasonable. That afterwards, in March, 1898, he appeared before the board of railroad commissioners, and attacked a decision of the supreme court, in what is known as the "Nebraska Case" (*Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418), in language violent and extreme. It sets out his action in retaining Mr. Caldwell on the commission, although he had first voted a reduction of rates, and had then changed his mind and reversed his action and that of his board. That the governor had filed a complaint before the railroad commissioners against the complainant, the North Carolina Railroad Company and the Raleigh & Gaston Railroad Company, which resulted in the attempt to reduce the rates of complainant, but produced no reduction as to the other companies. That in this complaint he demanded that a test case be made up, not to determine whether the rates were just and reasonable, but to decide whether the board had power to reduce rates. These are embraced in 4th, 8th, 9th, and 12th exceptions.

As to the action of the railroad commission: As has been stated, the gravamen of this bill, the issue of fact in the case, to which, and to which alone, the testimony can be directed, is, are the rates sought to be imposed upon the complainant by the railroad commission just and reasonable? One of the ways of showing this is by comparing the action of previous boards—of this board itself—towards these rates with the action which they now threaten; not that this may operate by way of estoppel, nor based upon the idea that a board, once having acted, cannot change its mind, or, having acquired knowledge of facts theretofore not within reach, or for any reason unknown, cannot, notwithstanding, change a former ruling. These are questions of law, not of fact. But by way of showing that rates here-

tofore adopted and declared to be just and reasonable, after careful consideration by boards differing in personnel, under circumstances not materially differing from those at present existing, may prima facie be presumed now to be just and reasonable. So, also, as to the action of the board towards the Raleigh & Gaston Railroad and the North Carolina Railroad. If the allegation that they are as prosperous as the complainant, that their circumstances do not differ from those of the complainant, can be established by testimony, then that would be one reason for believing that rates which are just and reasonable for them are just and reasonable for complainant. This evidence would bear directly upon the issues in the case. For a similar reason, all the allegations showing the comparative earnings of these several roads could be made to bear upon, and do themselves bear directly upon, the issues in the bill. These exceptions are not well taken, and are overruled.

With respect to the action of the governor: The governor of North Carolina is not a member of the board of railroad commissioners of the state. Whatever may be his personal influence upon any one or on all the members of the commission, he cannot be said to be responsible for their action. His approval or disapproval of their action could have no more weight in deciding the issues of this case than the approval or disapproval of any other citizen of North Carolina. If the evidence otherwise can show that the rates complained of are just and reasonable, or if, on the other hand, the evidence should show that they are not just and reasonable, the commendation or disapproval of the governor could not in any way contradict, vary, or control the evidence. He could not be called upon as a witness to express his opinion, unless it be shown that he is an expert; and then his evidence would be taken exactly the same as any other expert, unaffected by the circumstances that he is the executive and commander in chief of the state. So, also, with the matter of the eighth exception,—his attack on the Nebraska Case. What possible effect could this have upon the issues in this case, and in what possible way could this attack be introduced in evidence upon the issues of the case? It may be the opinion of a learned lawyer. It is given as the opinion of a distinguished official, but a circuit court of the United States can neither be persuaded nor terrorized into a disregard of the decisions of the supreme court of the United States, or into any disrespect of that high tribunal, by the opinions, attacks, or denunciation of any individual, however high his official position may be. So, in any aspect of the case, these allegations are not relevant to the issues in the case, and are therefore impertinent.

Again, it is alleged that this is a test case made by the railroad commission, not because the rates then existing were not just and reasonable, but to obtain a reversal of the ruling in the Nebraska Case,—all this at the instance of the governor. Now, courts do not sit to try moot cases, or to relieve the minds of lawyers who differ upon the application of principles of law. No matter how important the question in the abstract may be, unless there is a real controversy, arising upon actual fact, courts will not entertain it. *Railway Co. v. Wellman*, 143 U. S. 345, 12 Sup. Ct. 400. But in the statements of the

bill there appears to be a real controversy. The railroad commission are of the opinion that their rulings upon rates should not or cannot be reviewed in the courts. They think that under existing decisions of the supreme court of the United States their contention may be doubtful. They desire to obtain a reversal of these decisions. To that end they exercise the power they claim in order that its validity may be questioned, and a decision rendered therein. It is a real, vital, and earnest controversy, no doubt begun by the commission in good faith. It is by no means a moot question, and is far from a friendly difference of opinion. It does not come within the prohibition of fictitious or collusive cases, as in *Lord v. Veazil*, 8 How. 253, or *Gaines v. Hennen*, 24 How. 628. The courts are open to all who think that they have been wronged. The mere fact that cases similar to theirs have been passed upon does not shut the doors of justice to their complaint. The books abound with cases in which courts of the highest rank have reconsidered and have changed their opinions. The fact that the railroad commission has taken action with the view of having their power tested has no bearing upon the issues of this case. This issue is, are the rates which they seek to impose just and reasonable? Why they imposed them, if they imposed them at their own discretion, or if they were controlled by some master's hand, will make no difference whatever. Are the rates in themselves just and reasonable?

The 4th, 8th, 9th, and 12th exceptions are sustained. As the result of this opinion, there will be erased from the bill so much thereof as appears on the seventh page of the printed bill on line 14, beginning with the words, "and in his inaugural address," and ending with the words, "reductions in this particular," all inclusive. Also so much thereof as appears on the 8th and 9th pages of the printed bill, on line 31 of page 8, beginning with the words, "Thereupon, on said 30th day," continuing to page 9, and ending on page 9, line 21, with the words, "with which they were threatened," inclusive. Also so much of the bill as appears on printed page 9, line 22, beginning, "Thereafter, on 2d April," and ending on 30th line with the words, "Chairman of the Said Board," inclusive. And also so much of pages 10 and 11 of the printed bill as commences on page 10, line 31, with the words, "And in view of the facts," and ending on page 11, line 9, with the word "complaint."

D. A. TOMPKINS CO. et al. v. CHESTER MILLS.

(Circuit Court, D. South Carolina. October 20, 1898.)

1. INSOLVENT CORPORATIONS—CREDITORS' SUITS—COSTS AND ALLOWANCES.

Where, in a creditors' suit for the distribution of the assets of an insolvent corporation, the several bondholders were represented by different counsel, each will be required to pay his own counsel, and no allowance therefor will be made from the funds in the hands of the court.

2. SAME—MORTGAGE TRUSTEES.

Where the mortgage bondholders of an insolvent corporation had been called in, and had appeared and proved their claims in a creditors' suit before the trustee in the mortgage became a party, and his appearance was merely formal, for the purpose of perfecting the title to the property

sold, such trustee will not be allowed commissions on the sale, and only nominal fees and expenses, from a fund which is insufficient to pay the mortgage debt in full.

3. SAME—CONTRIBUTION TO EXPENSES OF COMPLAINANT.

An unsecured creditor of an insolvent corporation which had ceased doing business, who, before a right of action had accrued in favor of its bondholders, commenced suit for the appointment of a receiver to preserve its assets, and to have them applied to its indebtedness according to priority, in which suit the mortgagees and all other creditors afterwards joined, will be allowed a contribution towards his expenses from the fund realized, although the assets are insufficient to reach his claim in the distribution.

This was a creditors' suit for the conservation and distribution of the assets of defendant, an insolvent corporation. On final adjustment of costs and allowances.

H. B. Tompkins and Wilson & Wilson, for complainants.

A. G. Brice and H. Clarkson, for trustees.

Jones & Tillett, Mordecai & Gadsden, and Lord & Burke, for bondholders.

SIMONTON, Circuit Judge. This case comes up for final adjustment of the costs as between solicitor and client. The Chester Mills, an incorporated manufacturing company, was unfortunate in its business, and was compelled to close operations in June, 1897. The mill was then shut down, and no business whatever was done, and there were no prospects for resumption. At that date the Chester Mills property was covered by two mortgages: One, a first mortgage, dated 1st November, 1894, given to secure certain coupon bonds, in the aggregate \$50,000, with coupons attached, payable on 1st days of November and May in each year; the other a second mortgage dated the same (1st November, 1894), issued to secure bonds in the aggregate \$50,000, with coupons thereon payable semiannually. The coupons on the first mortgage bonds, maturing 1st May, 1897, were paid. Whether all of these were paid by the corporation, or whether Messrs. Woodward, Baldwin & Co. paid those numbered 1 to 91, inclusive, and 96 to 100, inclusive, does not yet appear. But no default in payment of coupons at that date was declared. Apparently all of the coupons on the second mortgage bonds are past due and unpaid. Besides these mortgage bonds and coupons, the corporation owed a large floating debt, unsecured. On 23d September, 1897, before the maturity of the coupons on the mortgage bonds, the D. A. Tompkins Company, a corporation of the state of North Carolina, an unsecured creditor to a large amount, filed a creditors' bill against the Chester Mills; averring its total insolvency, and praying that its affairs be wound up, and the rights of creditors be adjudicated and settled, and that meanwhile a receiver be appointed. The bill sets out the existence of the mortgages, but does not make the trustees of these mortgages parties. The fact that they were all citizens of North Carolina, the same state with complainant, will explain why they were not made parties defendant; and the further fact that, inasmuch as the inability to pay maturing coupons had not yet been declared, the trustees could not become co-complainants in this suit. The bill, however, prayed that

after a sale of the property of the insolvent corporation the proceeds thereof should be applied to the discharge of all valid liens according to their respective priorities. No resistance was made in the progress of the cause. The injunction issued. The receiver was appointed and took charge. On 19th September, 1898, the trustees of the first and second mortgages intervened, and were made parties complainant, and shortly thereafter an order for sale was made. Before the intervention of the trustees, the bondholders had been called in; and with few, if any, exceptions, all proved their bonds.

It is evident that there never has been anything but a technical controversy in this case, that all the main facts were admitted, and that all parties concurred in the same object,—the best and speediest mode of winding up and settling the affairs of an insolvent corporation. There was no fund to be sought, discovered, realized, and distributed. All the property of the Chester Mills was in sight; all its liens on record, their priorities unquestioned. No bondholder nor class of bondholders represented any but his or their own interest. The trustees came in at the eleventh hour, after all the bonds were in, and contributed the dry legal title in the mortgages. Under these circumstances the court is not called upon to any extraordinary or extravagant disposition of the funds under the control of the court. It is generally admitted that all of the property will accomplish little more than to pay the costs of the case, and a dividend on the first recorded lien.

Counsel for bondholders: The bondholders were represented by several firms, working independently for a common object, representing interests called in by the court. It is clear that they can claim compensation from their respective clients, and not out of the fund. Why should the Chester and Charlotte bondholders, who had their own counsel, contribute to the payment of the counsel for the Charleston bondholders, or vice versa? Each counsel representing bondholders labored for the interest of his own client. They have the right to an order that before distribution to their clients they be paid their compensation. They have a well-known recognized lien thereon. They have no claim or lien on funds going to other bondholders. "No one," says the supreme court of South Carolina in the well-considered case of *Hand v. Railroad Co.*, 21 S. C. 179, "can legally claim compensation for voluntary services to another, however beneficial they may be, nor for incidental benefits and advantages to one flowing to him on account of services rendered to another by whom he may have been employed. Before legal charge can be sustained, there must be a contract of employment, either expressly made, or superinduced by the law upon the facts."

As to the trustees: Trustees, having no personal interest, are always recompensed for services, and are reimbursed for expenses incurred, in protecting, preserving, or securing a common trust fund. They are thus protected because they represent all their *cestuis que trustent*. *Trustees v. Greenough*, 105 U. S. 536; *Cowdrey v. Railroad Co.*, 93 U. S. 354. And only because they are such representatives. But if the *cestuis que trustent* themselves are present, and themselves represented by their own counsel their own interest, and this by the

leave or with the consent of the court, the reason for the rule ceases. In the case at bar all the bondholders who can share in this fund are present. The trustees came in, not representing them. But, as they held the legal title in the mortgage, it was necessary that they should come in to perfect the sale. They are entitled to reimbursement for employing counsel. They are not entitled to any commissions. To this end, considering how essential their presence is, they are allowed \$400.

Complainants: This corporation was utterly insolvent. Its operations were suspended, its machinery idle and deteriorating, its property exposed to decay and destruction by the elements. The trustees of the mortgage could not act. By its terms there must have been default, and the request of one-third of the holders of the bonds to induce action on their part. The bondholders could not act, as the coupon maturing before this casualty had been paid. No one could act but a creditor holding a past-due unsecured debt. The complainants acted, filed this bill, and set the machinery of the court in operation, which led up to the inevitable result. All partake in the result. All stood by and acquiesced. Under these circumstances the complainant is entitled to a contribution out of the fund towards its expenses,—contribution, not compensation, for no fund was created. Nor can this contribution be large, for it is paid at the expense of a recorded lien, upon which is cast all the expenses of this suit. Let the complainant be paid out of the proceeds of sale, in addition to its costs, the sum of \$600.

McMASTER v. NEW YORK LIFE INS. CO.

(Circuit Court, N. D. Iowa, W. D. November 7, 1893.)

1. LIFE INSURANCE—CONSTRUCTION OF POLICY—LENGTH OF TERM OF CONTRACT.

A policy of life insurance providing for the payment of annual premiums by the assured is not a contract for one year, with the privilege of renewal from year to year by the payment of the premiums, but a contract for the life of the assured, subject to forfeiture and termination for non-performance of its conditions; and it is incumbent on the party pleading such forfeiture to clearly establish the defense.

2. SAME—INCONSISTENT PROVISIONS.

A policy of life insurance, wherein the assured has no voice in the selection of terms used, must be construed against the party who prepared it; and, if it contains provisions which are inconsistent or contradictory, force must be given to those which sustain, rather than to those which would forfeit, the contract.

3. SAME—INCORPORATING APPLICATION IN POLICY.

Where an insurance policy is expressly based upon the application, which is made a part thereof, the two instruments are to be construed together as one contract.

4. SAME—CONTRACT CONSTRUED.

An applicant for life insurance, as required, designated in the application the basis upon which the premiums should be computed, that they should be payable annually, and that the policy should not go into effect until the first premium was paid. The application was accepted, and a policy issued thereon, which expressly made the application a part thereof, and to which the application was attached. The policy was dated, December 18, 1893, and was delivered, and the full premium for one year at the designated rate paid, on December 26th. It contained a provision,

however, that the subsequent annual premiums should become due and payable on the 12th of each December,—the date of the application; but such provision was not called to the attention of the assured, and he did not in fact read the policy, being told by the agent that it was in accordance with the application. The policy further provided that a grace of one month should be allowed in the payment of subsequent premiums by the payment of interest, and that during such month the premium and interest should be considered a debt due the company, and deducted from the amount of the policy in case of death. The assured died on the morning of January 18, 1895, not having paid any further premiums. *Held* that, admitting the force between the parties of a custom of the company to make the date of the first payment relate back to the date of the policy, the provision that further premiums should become payable on December 12th was inconsistent with the application, and of the further provision of the policy itself, that the payments should be annual, and could not be enforced; that, the assured having paid a full year's premium, a second payment was not due until December 18, 1894, and the month of grace had not expired, nor the policy become forfeitable, at the time of his death.

5. SAME—ACTION ON POLICY—STATEMENTS WRITTEN IN APPLICATION BY AGENT OF INSURER.

Under Code Iowa, § 1750, which makes the acts of a solicitor or other agent of an insurance company the acts of the company, and not of the applicant, a plaintiff in an action at law on a policy may show that words appearing in the application were written by the agent of the company after the application was signed by the assured, and without his knowledge or consent, for the benefit of the agent himself.

6. SAME—EFFECT OF REQUEST IN APPLICATION.

A clause in an application for life insurance requesting that the policy issued thereon shall be dated as of the date of the application, even if binding on the applicant, cannot be invoked by the company to support a provision inserted in the policy making the second annual premium payable one year from the date of the application, where the request was not complied with and the policy bears a later date.

7. SAME—ESTOPPEL OF ASSURED BY ACCEPTANCE OF POLICY.

The acceptance of a life insurance policy by an assured does not bind him, as an assent to provisions which conflict with the application, which is also made a part thereof, when his attention is not called to the variance, and he accepts the policy without reading, on the assurance of the agent of the company that it is in exact accordance with the application.

8. SAME—DEFENSES.

Where an assured was allowed by a life insurance policy a term of grace, after a premium became payable, within which payment might be made, and during which the policy was not forfeitable, and the assured dies within such term without having made the payment, it is immaterial to a right of recovery on the policy whether or not he intended to make the payment.¹

By written stipulation duly signed and filed, the parties to this action waived a jury trial, and consented to try the case before the court; and, the evidence having been fully submitted, the court finds the facts established by the evidence to be as follows:

(1) The plaintiff, Fred A. McMaster, was when the suit was brought, and is now, the lawfully appointed administrator of the estate of Frank E. McMaster, deceased, having been appointed administrator of the named estate by the probate court of Woodbury county, Iowa; and furthermore said plain-

¹ The above is a syllabus of the opinion of Judge Shiras, though, following a ruling made by the circuit court of appeals for the Eighth circuit on an appeal in a suit in equity involving the same policies, judgment in this action was rendered for defendant.

tiff was when this suit was brought, and is now, a citizen of the state of Iowa, and a resident of Woodbury county, Iowa.

(2) That the defendant, the New York Life Insurance Company, was when this suit was brought, and is now, a corporation created under the laws of the state of New York; having its principal office and place of business in the city of New York, in the state of New York, but being also engaged in carrying on its business of life insurance in the state of Iowa, and other states.

(3) That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company, residing at Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that company, and, as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company, and set forth in the circular issued by the company, and printed on the back of the policy issued by the company, under the heading, "Benefits and Provisions Referred to in This Policy," in the following words: "After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 % per annum for the number of days during which the premiums remain due and unpaid. During said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company; and, in the event of the death during the said month, this indebtedness will be deducted from the amount of insurance."

(4) Relying on the benefits of this provision, and in the belief that if he accepted a policy of insurance upon his life from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until 13 months had elapsed since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on, and attached to the petition; the same being made part of this finding of facts.

(5) In the application, when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of \$5,000, to be evidenced by five policies, for \$1,000 each, on the ordinary life table; the premium to be payable annually.

(6) There now appears on the face of the application, interlined in ink, the words, "Please date policy same as application." These words were not in the application when it was signed by McMaster, but after the signing thereof they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written in by the agent in order to secure to the agent a bonus which the company allowed the agents for business secured during the month of December, 1893; and it does not appear that Frank E. McMaster ever knew that those words had been written into the application, and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company, and was acted on by the company.

(7) By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company, and Frank E. McMaster, when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies, and that the contract of insurance was not to take effect until the policies were delivered.

(8) The defendant company, at its home office, in New York City, upon receipt of the application, determined to grant the insurance applied for, and issued five policies, each for the sum of \$1,000, dated December 18, 1893, and reciting on the face thereof that the annual premium on each policy was \$21, and forwarded the same to its agent, F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made a part of this finding of fact, and each policy contains the recital: "This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one

dollars and — cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy."

(9) The five policies, inclosed in envelopes, on or about December 26, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of 13 months, to which the agent replied that they did so insure him; and thereupon McMaster paid the agent the full first annual premium, or the sum of \$21, on each policy, and, without reading the policies, he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity for reading them, but in fact did not read them, and accepted them on the statement of the agent of the company as hereinabove set forth.

(10) That not later than November 17, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the state of New York.

(11) The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster in the defendant company were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment thereon; saying that he had seen other policies which promised better results, and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions, like 30 days of grace, and loans, and, in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums, and that, as she understood it, the grace on the second premiums would expire January 11th; and McMaster said, if he concluded to keep any of the insurance, he would call and pay for it before the grace expired.

(12) That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company; it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company at the expiration of his insurance in the defendant company, but also to continue part of the policies held in the defendant company.

(13) That on or about January 15, 1895, the agent of the Union Central Company, meeting McMaster on the street in Sioux City, told him the policies issued by the Union Central Company had been received, and in reply McMaster said: "All right. Just hold them. There is no hurry about them." And in the same conversation he stated that he had other insurance,—referring to the policies in the defendant company.

(14) That the action of Frank E. McMaster shows, and the court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for the period of 13 months from the date of the policies, and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part.

(15) That Frank E. McMaster died at Sioux City on the morning of January 18, 1895.

(16) That up to the time of his death the said Frank E. McMaster had not paid the second year's premiums on the policies issued to him by the defendant company, nor have the same been paid since his death; nor had the said McMaster received or paid for the policies issued by the Union Central Company, and the same had not been delivered or become effectual.

(17) That due and sufficient notice and proofs of the death of said Frank E. McMaster were immediately sent to and received by the defendant company; and due demand for the payment of the five policies sued on was made by the plaintiff, as administrator of the estate of Frank E. McMaster, and refused by the defendant company on the ground that the policies in

question had lapsed and were not in force at the time of the death of said Frank E. McMaster, by reason of the failure to pay the second year's premiums coming due on said policies.

(18) That the defendant company has not paid said policies, or any part thereof, and, assuming the same to be valid, there is due thereon, November 1, 1898, the sum of \$5,965, after deducting from the face of the policies the amount of the second premiums, with interest thereon to March 14, 1895.

F. E. Gill and Taylor & Burgess, for plaintiff.

W. E. Odell and Swan, Lawrence & Swan, for defendant.

SHIRAS, District Judge. A suit in equity was brought in this court by the administrator of the estate of Frank E. McMaster against the defendant insurance company, praying a reformation of the policies in question, on the ground that the provision inserted therein making the second annual premiums payable on the 12th day of December, 1894, was not in accordance with the agreement of the parties; and upon the hearing of that case this court held that, under the rules of construction applied to contracts of this character, the plaintiff could recover at law thereon, but as the evidence clearly proved that the application signed by McMaster had been changed, after he signed it, by the interlineation of the words, "Please date policy same date as application" (this interlineation being made by the agent of the defendant company without the knowledge or assent of McMaster, which interlineation, made for the benefit of the agent of the defendant company, and against the interest of the applicant, McMaster, had caused the defendant, when issuing the policies, to make the second year's premium payable on December 12, 1894, although the policies were dated December 18, and not delivered until December 26, 1893), the policies ought to be reformed to accord with the actual agreement of the parties. *McMaster v. Insurance Co.*, 78 Fed. 33. Upon appeal to the circuit court of appeals for this circuit, the decree of reformation was reversed; that court holding that the policies, in the form in which they were delivered, must be held to represent the contract of the parties; the court further expressing the opinion that no recovery could be had thereon at law or in equity. *Insurance Co. v. McMaster*, 30 C. C. A. 532, 87 Fed. 63. The case at law is now before the court; the question being whether a recovery can be had upon the policies in their present form, and under the facts now proven by the evidence.

The policies are dated December 18, 1893. They were delivered, and one annual payment of \$21 was then paid on each policy. This payment and the delivery of the policies put in force contracts for insurance, good not for one year only, but good for the lifetime of McMaster. Thus, in *Insurance Co. v. Statham*, 93 U. S. 24, it is said:

"We agree with the court below that the contract is not an assurance for a single year, with the privilege of renewal from year to year by paying the annual premium, but that it is an entire contract for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums."

In *Thompson v. Insurance Co.*, 104 U. S. 252, it is ruled:

"We do not accept the position that the payment of the annual premium is a condition precedent to the continuance of the policy. That is untrue. It is a condition subsequent only, the nonperformance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is

always open for the assured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted."

Forfeitures are not favored, either at law or in equity; and to sustain the right to declare a contract, which has gone into effect, forfeited by reason of a subsequent failure to perform its conditions, it is incumbent on the party pleading the forfeiture to clearly establish the defense; and in the case of contracts like insurance policies, wherein the assured has no voice in the selection of the terms used, the construction must be against the party who prepared the contract; and, furthermore, if there be found in the policy provisions which are inconsistent or contradictory, force must be given to those that sustain, rather than to those which would forfeit, the contract. Thus, in *National Bank v. Insurance Co.*, 95 U. S. 673, 678, it is ruled:

"But, without adopting either of these constructions, we rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its own language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

In this case, on page 675, it is said:

"The entire application having been made, by express words, a part of the policy, it is entitled to the same consideration as if it had been inserted at large in the instrument. The policy and application together therefore constitute the written agreement of insurance, and, in ascertaining the intention of the parties, full effect must be given to the conditions, clauses, and stipulations contained in both instruments."

In the policies sued on in this case the applications are attached to the policies, and are expressly made part thereof, and therefore full effect must be given to the stipulations and provisions therein contained. It is a familiar rule in the construction of contracts that the court should, so far as possible, place itself in the position the parties occupied when the contract was entered into; and to this end it may follow the successive steps which the evidence proves were taken by the parties themselves when entering into the contract which is before the court for construction. The policies sued on recite on their face that they are made in consideration of the provisions of the applications, and it is well known that the making of the application precedes the issuance of the policy; so we turn to it, in the first instance, to ascertain from its provisions what the contract was which the parties proposed to enter into. The application contained the usual questions as to the age of the party, his previous condition of health, and other like matters; and then clause 10 required a statement of the sum to be insured, of the premiums payable (whether annually, semiannually, or quarterly), and on what table the premium is to be calculated (whether on that of ordinary life,

endowment, or limited endowment). The applicant, in the mode pointed out on the application, stated that he desired insurance in the sum of \$5,000, in the form of five policies, of \$1,000 each; the premiums to be payable annually; the amount thereof to be calculated on the ordinary life table; it being also stated that the policies issued on these applications should not be in force until the first premiums thereon were paid to the company or its agent. As is well known from the common custom of insurance companies, and as appears from the form of the application prepared by the defendant company, a choice is given to the applicant to determine whether the premiums are to be paid at intervals of a quarter of a year, of a half year, or yearly; and the amount of each payment is fixed by the selection made by the applicant. So, also, a choice is given to the applicant to determine whether the payment of premiums is to be continued during the lifetime of the assured, or is to cease at the end of a named period of years; the amount of each premium being affected by the choice made in these particulars. When the insurance company submits to the party to be insured, as was done in this case, a form of application which requires the applicant to determine the table according to which the amount of the premium is to be calculated, and also the time when payable,—whether quarterly, semi-annually, or annually,—and the applicant makes his selection in these particulars, and the policy is issued upon the basis of the application, certainly both parties must be bound thereby. Thus, in this case, when the company submitted the application to the assured for the purpose of having him determine whether the payments of the premiums should be made quarterly, semiannually or annually, and also upon what table of rates the premiums should be calculated, and the assured, in the manner required by the application submitted to him, declared that the premium was to be paid annually,—the amount to be calculated on that basis by the ordinary life table,—and thereupon the company issued the policy, making this application part of the contract between the parties, what was the result? The agreement of the parties was that the first premium was to be paid in advance; that is, the contract of insurance was not to take effect until the premium was paid. It was also agreed that the premiums were to be paid annually (that is, each subsequent premium was to become due and payable after the lapse of one year from the time the preceding premium became due), and the amount of each yearly payment was to be calculated on the basis of the ordinary life table. Naturally the next question that would arise would be as to the effect of a failure to pay any of the premiums coming due after the policy had become effectual. Unless the contract contains a provision authorizing a forfeiture thereof for nonpayment of premiums, a policy of life insurance which has once gone into effect will not be terminated by the failure to pay subsequent premiums. In such case the only right the insurance company has is to set off against the amount due on the policy the amount of the unpaid premiums, with interest thereon from the time each payment came due. Hence it is that the life companies make provision for forfeiture for nonpayment of premiums, under certain

terms and conditions. The evidence in this case shows that this question of the right of forfeiture did in fact arise, and it was answered by pressing on the attention of McMaster the provisions found under the head of "Benefits and Provisions Referred to in This Policy," in which it is provided that premiums are due and payable at the home office of the company, or to agents holding properly signed receipts; it being then stated:

"If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company." "After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent. per annum for the number of days during which the premium remains due and unpaid. During said month of grace, the unpaid premium, with interest as above, remains an indebtedness due the company; and, in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance."

When the company, in the form of the application submitted to McMaster, stated that the policy would not become binding until the first premium was paid, the company declared that the first premium must be paid in advance (that is, at the time the policy would go into effect); but, as to the subsequent premiums, the company gave McMaster the right to say whether they should be made payable quarterly, semiannually, or annually; and when he made the choice, agreeing to pay the same annually, that fixed the times at which the subsequent premiums were to come due; and when the company accepted this application, and made it, not only a part of, but the very basis of, the contract of insurance, it seems clear that the company must be bound by its terms. The choice given to McMaster in selecting the mode of payment of the premiums gave one year as the longest limit. He could select a year, or a less period; that is, a quarter or a half year. By electing to pay the premiums annually, McMaster indicated that his purpose was to have a year's interval between the dates when payment could be demanded of him; and by issuing the policy on an application thus worded, by calculating the premiums on the basis of annual payments, and stating on the face of the policy that the amount of the annual premium was \$21 on each policy, and by accepting that amount from McMaster, the company clearly agreed, on its part, that, after the taking effect of the policies by the payment of the first annual premium, the payment of the subsequent premiums could only be demanded after the lapse of one year from the date when the preceding payment came due. The company, by calculating the premiums on the basis of annual payments, and by demanding and accepting from McMaster one full year's premium as the payment necessary to be made to put the policies in force, put its own construction on the application, and thereby showed that it understood that it was entitled to demand payment of the premiums by yearly installments of \$21 each; and as McMaster had, in writing on the face of the application, stated that he wished the premiums to be made payable annually, there can be no doubt that both parties understood that the first premium was to be paid in advance, in order to give life to the contract, and that the subsequent payments were to be made yearly thereafter. The company,

at its home office, concluded to accept the risk, and thereupon issued five policies, dating them December 18, 1893, and forwarded them to Sioux City, where they were delivered to McMaster on December 26th; he paying the first year's premiums on the delivery of the policies. Granting the contention of the company that, under the usual practice in such matters, the payment, although actually made on the 26th, is deemed to have been made on the day of the date of the policies (that being the time when the company decided to accept the risk), then the situation would be this: On the 18th of December, 1893, the company entered into a contract of insurance with McMaster, in which it was agreed that the premiums were to be paid annually; and the company on the 18th of December received the first year's premium in full, and delivered the policies. Suppose at the end of three months the company had demanded of McMaster the payment of a further or second premium; would it not have been open to him to reply that the agreement was that the payments were to be made annually; that the first payment had been made, and the policy was dated December 18th, and therefore the next payment was not due or demandable until the expiration of a year from that date? Could the company, in response thereto, be permitted to aver: "It is true, when negotiations touching this insurance were pending we required of you to determine the mode in which the premiums were to be calculated and to be made payable. It is true that, in the application submitted to you for that purpose, you stated that the payments were to be made annually, and were to be calculated according to the ordinary life table, on the basis of yearly payments. It is true that we issued the policies on the basis of the application signed by you, and expressly made it a part of the contract between us. It is true, we calculated the amount of the premiums to be paid on the basis of yearly payments. It is true that on the face of the policies we stated that the annual premium was \$21 on each policy. It is true that, when we delivered the policies to you, we demanded and received from you one full year's premium, and thereupon delivered to you the policies; they being dated December 18, 1893. It is true that only three months from that date has elapsed, but we are entitled to now demand payment of another premium, because we wrote in on the face of the policies a provision which makes the second premium payable at the end of three months, and you accepted the policies in this form; and therefore, unless you now pay this second premium, we will declare the policies forfeited, and we will retain for our own benefit the full year's premiums paid by you, although three months only of that year has elapsed." Would a court, either of law or equity, be justified in so construing the contract of the parties as to permit a forfeiture in case the assured did not pay the second premium at the end of three months? It is the well-settled rule that in construing a contract all parts and provisions thereof are to be considered. What constitutes the contract of insurance, upon which the rights of the parties in this case depend? This question is answered by the supreme court in the case (already cited) of *National Bank v. Insurance Co.*, 95 U. S. 673, wherein it is declared that:

"The entire application having been made, by express words, a part of the policy, it is entitled to the same consideration as if it had been inserted at large in that instrument. The policy and application together therefore constitute the written agreement of insurance, and, in ascertaining the intention of the parties, full effect must be given to the conditions, clauses, and stipulations contained in both instruments."

Taking up, then, for consideration, the contract between the parties, we find in one portion of it an express provision that the premiums to be paid are to be paid annually, and that the amount thereof is to be calculated on that basis, according to the ordinary life table. Turning to another portion of the contract, we find a provision which requires the second and subsequent premiums to be paid at periods less than one year from the date of the contract, and from the time when the first payment was made. Under the first provision, the assured cannot be required to pay the second premiums until after the lapse of one year from the date of the contract. Under the second provision, payment of the second premiums is demandable in a period of less than one year. These provisions are clearly inconsistent and contradictory. The rules of construction in case contradictory provisions exist in the same contract are well settled. Where, as is the fact with reference to insurance contracts, one party prepares the form of the contract, and requires the other party to accept it as thus prepared, the construction thereof must be against the party who prepared the contract. If possible, the contract must be so construed as to sustain it, and not to defeat it. If the parties by their own action have agreed upon a construction of the contract, that may be followed as the guide to the intent of the parties. When the company, having issued the policies sued on, took action thereon, it demanded from McMaster a full year's premium, and he paid the same; and thus both parties clearly showed that, as they understood the contract, it was based upon the payment of annual premiums. That this was the understanding of the company is further evidenced by the fact that the amount of each premium to be paid, as shown upon the face of the policy, is \$21; that amount being entered under the words "Annual Premium," which are placed on the side of the first page of the policy, in a position to catch the eye,—being so placed, doubtless, so that any one interested will see at a glance the amount of the premium, and period of payment. If the contention of the defendant to the effect that, under the contract of the parties, it could rightfully demand payment of the second premium before the expiration of a year from the date of the policies, is sustained, it follows that the contract will be forfeited, whereas the recognized rule requires a construction that will sustain the contract, if that be possible. The purpose McMaster had in view in entering into the contract was to secure indemnity in the sum of \$5,000 to his estate, in case of his death; and, to secure this indemnity, he agreed to pay to the company the yearly sum of \$21 on each policy. The purpose of the insurance company in entering into the contract was to obtain the benefit of the yearly premiums called for by the contract, and, to induce the payment thereof, the company agreed to indemnify the estate of McMaster, upon his death, in the sum of \$5,000; and, to secure the payment of the yearly premiums, it was fur-

ther provided that under certain conditions the contract might be forfeited for nonpayment of an overdue premium. If the contracts of insurance be now held valid, the purpose of McMaster in entering into the same will be fulfilled, as his estate will thus receive the indemnity he paid his money to secure. So, also, the purpose of the insurance company will be fulfilled, in that it will be entitled to retain the premium already paid, and to be paid any other premium that had become due before the death of McMaster. If, however, the contracts of insurance are held to be invalid and nonenforceable, then the purpose of McMaster in entering into the same will be wholly defeated, and the insurance company will be allowed to avoid its promise to pay the amount of the policies on the death of the assured, while it is permitted to retain the sums paid it to secure indemnity. In effect, the contention of the defendant company now is that the contract of insurance must be construed in its favor; that it should be so construed as to defeat the purpose for which it was made, and to declare it forfeited, rather than to sustain it; and, finally, in construing its provisions the construction already put thereon by the parties must be disregarded. The pivotal point in the case is whether the contract of insurance provides on its face that the premiums were to be paid annually. If it does, this means that the second premium cannot be demanded and does not become due and payable until a full year has elapsed after the date of the policy. Taking into consideration the fact that the company required McMaster to designate on the face of the application whether the premiums were to be paid quarterly, semiannually, or annually; that McMaster declared his choice to be for annual payments, and so stated on the face of the application; that the company accepted the application as thus made, and issued policies which in terms make the application part of the contract; that the form of the policies issued by the company is that used when the premiums are to be paid annually; that the amount of the several premiums to be paid were by the company calculated on the basis of annual payments, and the amount thereof was stated on the side of the policies under the heading "Annual Premium"; that when the company delivered the policies it demanded from McMaster, and he paid, one year's premium in full,—can there be any possible doubt that the parties understood that the contracts of insurance entered into between them provided for annual payment of the premiums? Can there be any doubt that when McMaster received the policies dated December 18, 1893, and paid one year's premiums thereon, he was justified in assuming that, if he died within one year from the date of the policies, his estate would receive the indemnity which it was his purpose to secure, even though the policies did not contain the provision giving one month's grace on subsequent payments. Suppose McMaster had died on the 1st of December, 1894, less than one year from the date of the policies; would it be open to the company to deny liability on the policies on the ground that it had put in the policies a provision that the second premiums were payable on October 1, 1894? That is exactly the claim now made by the defendant company. If the company, after accepting a proposition to insure McMaster on the basis of annual premiums, can

make the second premiums payable in six days less than a full year,—which is its claim in the present case,—it could have made the second premiums payable in three or six months, and would thus change the policy from one wherein the premiums were payable annually into one wherein the premiums were payable quarterly or semi-annually. In such case it would appear that the contract of insurance contained inconsistent and contradictory provisions, and in that event the settled rules of construction require that force shall be given to the provisions which will sustain the contract, rather than to those which would work a forfeiture thereof.

I repeat the assumed case already stated: Suppose these policies did not contain the provision with respect to the so-called month of grace in the payment of subsequent premiums, but did contain a provision that, if the premiums were not paid on the day they came due, the policies were forfeited. Suppose the contract of insurance had been entered into in the mode proven in this case, and the policies, in the present form, except as to the forfeiture clause, had been issued, dated December 18, 1893, and had been delivered upon the payment by McMaster of one full year's premium thereon, and that McMaster had died on the 15th of December, 1894; that is, in less than a year from the date of the policies. Would it be open to the defendant company to claim a forfeiture of the contracts, under such circumstances? Could the company be permitted to say: "It is true, we required McMaster to designate the kind of policy we were to issue, and he selected policies to be based upon annual payment of the premiums, and so stated in the application. It is true, we issued policies of the form used for annual payments. It is true that we calculated the premiums on the basis of annual payments, and stated the amount on the face of the policies. It is true, when we delivered the policies, we demanded, and McMaster paid us, one year's premium in full. It is true, McMaster died in less than one year from the date of the policies. But his estate cannot recover the indemnity he had paid for, because we put into the policy a provision making the second premium due and payable on the 12th of December, and, as McMaster had not paid this second premium, his estate cannot recover, even though it be true that he died in less than a year from the date of the policy." Would a court be justified in holding that a forfeiture of the contract had happened under such circumstances? Would not the answer be that the application, which forms part of the contract between the parties, expressly provided that the premiums were to be payable annually, and the act of the company in so wording another part of the contract as to require the second premium to be paid in a less period simply resulted in putting contradictory provisions in the contract, in which event the construction must be most favorable to the assured, and in favor of sustaining the policy. But it is said that in this supposed case the party assured died during the year for which the premium had been paid, and that while a court would not permit a forfeiture during that period, because in fact the premiums for that period had been paid, yet a different rule would prevail if the party died after the year for which the premium was paid had elapsed, but during the

so-called month of grace. If policies of life insurance were like fire insurance contracts, where the risk assumed by the company terminates at a date fixed in the contract, there might be some force in the argument; but such is not the case, and the analogy suggested is misleading. In fire insurance contracts the risk is assumed for a fixed period, and the premiums demanded and paid only keep the contract in force for a named and known period. When that period elapses the contract is at an end, unless new life is given it by a renewal for another fixed period, and in such cases the payment of a year's premiums only entitles the insured to protection against loss for that period. In cases of life insurance under policies such as are sued on in this case, the contract of insurance, when once it takes effect by payment of the first year's premium and delivery of the policies, does not terminate at the end of the year, but it is a contract for the life of the assured. In other words, when the company in this case issued these policies under date of December 18, 1893, received payment of the first premiums thereon, and delivered the policies to McMaster, the company agreed on its part to pay the amounts called for in the policies to the estate of McMaster upon his death, whenever that event might occur. If the policies contained no provision for the forfeiture thereof, no further payment on part of McMaster would have been needed to keep the policies in full force. All the company could demand in such case would be the right to set off against the amount of indemnity it had bound itself to pay the amount of the premiums remaining unpaid, with interest thereon.

The fact being proven that the first premiums on the policies were in fact paid to the company, and that the policies were delivered to McMaster, it follows that, from the time of the delivery of the policies, McMaster had contracts which bound the company to pay his estate the sum of \$5,000 on his death. By their terms the policies of insurance, as contracts, extend, not from year to year, but from their date (December 18, 1893) until the death of McMaster, whenever that might occur. The payment of the first premium and the delivery of the policies put them into effect for this period, and not solely for one year, subject to the right of forfeiture secured to the company. Therefore when McMaster died, on the 18th of January, 1895, the company was bound to pay to his estate the amount called for by the policies, unless the same had become forfeited under some provision thereof securing the right of forfeiture to the company. The provisions of the policies already quoted in full do not declare that the same shall be forfeited if a premium comes due and is not then paid, but it is declared that during one month after a premium becomes due the company will decree the unpaid premium to be an indebtedness due the company, running at interest, and that, if the assured dies during this month of grace, the amount of the unpaid premium, with interest, will be deducted from the sum due on the policy. Under this clause of the policy, to entitle the company to declare the contract forfeited it must appear that a premium has become due and demandable, that a full month has elapsed since the premium became thus due, and that during this month the amount of the premium, with interest, has not been paid, and that the assured

is still living. If during the so-called month of grace the premium is paid, with interest, or if the party insured dies, the right of forfeiture does not accrue, and the policies remain in full force. The so-called month of grace does not begin to run until a premium becomes due and demandable from the person insured, and thus we come back to the question, when did McMaster become bound to pay the second premiums on the policies sued on? If the payment of the second premiums could not be properly demanded of him until the expiration of one year from the date of the policies, then the second payment did not become due until December 18, 1894; the month of grace would not begin to run until that payment became due, and, being a calendar month, it would extend to and would include the 18th day of January, 1895, on the morning of which day McMaster died. Therefore it is that the company claims that the second premium became due and payable on December 12, 1894. If the contract between the parties, when considered in all its clauses and provisions, shows that it was agreed and understood between the parties that the second premium was to become due and payable on December 12, 1894, then it is clear that when McMaster died the policies had become forfeited, and, of course, no recovery thereon can be had. If, however, the contract shows that McMaster contracted with the company on the basis of payments to be made annually, and the company dealt with him on that basis, but, to serve the interests of its own agents, it, without consulting McMaster or calling his attention thereto, introduced a provision into the policy which makes the second premium payable in less than a year, and it thus appears that in the same contract there are to be found inconsistent and contradictory statements and provisions, then, under the settled rules of construction, the court should give force to those provisions which will prevent a forfeiture, which will sustain the contract, and will be most favorable to the assured, disregarding those which would lead to the contrary result. But it is said the company was justified in what it did with respect to making the second premium due and payable in less than a year, by reason of the statement written into the face of the application, asking that the policy be dated the same as the application, and that it is not open, in an action at law, to show that these words were not in the application when the same was signed by McMaster, but had been written in the application, after it had been signed, by the agent of the company; and therefore these words must be taken to be the act of McMaster, upon which the company had a right to rely. The provisions of section 1750, Code Iowa, were in force in 1893, when these contracts of insurance were entered into, and this statute makes the act of a solicitor or other agent acting for the company the act of the company, and not the act of the applicant for insurance. In the case of *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87, this statute was construed by the supreme court with respect to a life policy issued by a foreign company in Iowa, it being held that:

"This statute was in force at the time the application for the policy in suit was taken, and therefore governs the present case. It dispenses with any inquiry as to whether the application or the policy, either expressly or by

necessary implication, made Boak the agent of the assured in taking such application. By force of the statute he was the agent of the company in soliciting and procuring the application. He could not by any act of his shake off the character of agent for the company. Nor could the company by any provision in the application or policy convert him into an agent of the assured. If it could, then the object of the statute would be defeated. * * * His act in writing the answer which is alleged to be untrue was, under the circumstances, the act of the company."

The case just cited was an action at law based upon a life insurance policy issued on the life of Richard Stevens. The defendant company pleaded that in the application signed by Stevens there was a misstatement of a material fact, in that it was therein stated that Stevens had no other insurance on his life, whereas in fact he had, when the application was signed, a large amount of insurance in co-operative companies. On the trial before the jury the court permitted the plaintiff to show by oral testimony that the answer to the question about other insurance was written into the application by the agent of the insurance company after he had been informed by the applicant that he held this co-operative insurance. The supreme court affirmed the action of the trial court; holding that under the statute of Iowa it was open to the plaintiff to prove by whom the statement in the application had in fact been written, and that, it appearing from the evidence that the statement was written by the soliciting agent of the company, it must be held, in law, to be the act of the company, and being its act, and not that of the assured, it could not be relied on to defeat a recovery on the policy, even though it appeared that it was so written into the application before Stevens signed the same. Under the ruling of the supreme court in the case just cited, it must be held that it is open to the plaintiff to show that the words, "Please date policy same as application," were written into the application, not by McMaster, but by the agent of the company, and that they were so written after the application had been signed by McMaster, and without his knowledge or assent. As the proof is clear that these words were thus written into the application by the agent of the company, and without the knowledge of McMaster, it is settled that the placing them in the application was, in law, the act of the company, and not that of McMaster; and the company cannot rely on its own act, done without the knowledge or assent of the assured, as a ground for estopping the assured or his representative from claiming that under the contract of insurance the premiums were to be paid annually. But furthermore the company did not in fact comply with the clause thus written into the application. That requested that the policies should bear the same date as the application, which was December 12, 1893. The policies, when issued, were dated December 18, 1893; and thus the company refused to comply with the request written into the application. Having refused the request as made, upon what theory can it be said that it made the second premium payable on December 12, 1894, at the request of the assured? Neither on the face of the application nor in any other way was such a request made by McMaster or by any one else. The company, by its own act, not requested or authorized by McMaster, chose to write into the policy the provision making the second premium come due

at a time less than one year after the date of the policy; and there exists no ground for the claim that McMaster was bound by the act of the company, by way of estoppel or otherwise.

But it is contended on behalf of the defendant that when the policies were delivered to McMaster they contained the provision making the second premium due and payable on December 12, 1894, and by accepting them with this provision he indicated his consent to this change in the time of payment. If the evidence proved that the company called McMaster's attention to this provision of the policies, and that he assented thereto, there would be foundation for the claim made; but the evidence proves that his attention was not called to the provision, and that he accepted the policies and made payment therefor without reading the same, in reliance upon the statement of the agent of the company that the policies were in exact accordance with the terms previously agreed upon. There is nothing therefore in the facts proven from which it can be inferred that McMaster ever knowingly assented to the provisions now found in the policies, whereby the second payment of the premium was made payable at a date less than one year from the date of the policies. But it is said that, even though he did not read the policies, he had the opportunity to do so, and therefore that it must be held that he agreed to accept and be bound by the contracts in the form in which they were delivered and accepted. Granted. What do the contracts, properly construed, require with respect to the payment of the second premiums? Turning to that part of the contract set forth in the application, there is the statement, in plain words, "Premium payable annually." The policies are dated December 18, 1893, and the first premiums were paid on December 26th; but, under the custom of insurance companies, it is considered the same as though paid on the 18th, the date of the policies. Certainly, under this clause of the contract, the second payments could not become due or be claimed until the lapse of one year from December 18, 1893. Turning to another clause of the contract, we find a provision making the second premium due and payable in less than one year from the date of the policies. Are these provisions consistent, or are they inconsistent and contradictory? If inconsistent and contradictory, then it is the settled law that force shall be given to the provision that maintains the life of the contract, and that protects the assured rather than the company, through whose fault these inconsistent and contradictory provisions have been introduced into the contracts. Admitting, therefore, that McMaster is to be bound by the contracts in the form in which they were delivered, he can only be held bound by the legal construction thereof as a whole; and thus we come back in every instance to the crucial question, do these contracts contain contradictory provisions with respect to the time when the second premium could be rightfully demanded from McMaster? Upon that question depends the result in the case.

But it is further contended that there is some evidence tending to show that McMaster did not intend to make a second payment of premiums on these policies, and therefore his representative ought not to recover thereon, as McMaster died after the year for which he had paid the premiums had expired. If policies of life insurance

were like fire policies, in that they terminate at a fixed date, there might be some force in this argument; but as already stated, and as expressly ruled in *Insurance Co. v. Statham*, 93 U. S. 24, and *Thompson v. Insurance Co.*, 104 U. S. 252 (cases already cited), contracts of life insurance, such as those sued on, are good for the lifetime of the assured. Therefore, when McMaster died these policies were in force, unless they had become forfeited under the provisions of the policy. There is nothing in the evidence which tends to show that McMaster intended to waive any benefit or protection these contracts would give him, or to yield up any right which his estate might lawfully assert thereunder in the event of his death. There is some evidence tending to show that McMaster contemplated taking a policy in another company in lieu of part of his insurance in the defendant company, but this purpose had not progressed so far that he had released the defendant company from its liability on the policies sued on, nor can it be known, if McMaster had lived, whether in fact he would have finally forfeited any part of this insurance or not. During his lifetime he had done no act which released the company from its obligations, and therefore the company is bound to the payment of the sums called for by these policies, unless it be held that the same, when McMaster died, had become forfeited for nonpayment of the second premiums due on the policies, and which forfeiture could not be claimed, unless it be true that a full calendar month had elapsed between the date when these premiums could be lawfully demanded and the date of McMaster's death. To sustain the plea of forfeiture, it must be held that the parties had contracted and agreed that the second premiums should come due in a period less than one year from the date of the policies. If there is doubt on this question,—if the contracts between the parties contain contradictory provisions on this point,—then the court is required to look at, and give due weight to, the acts of the parties with reference to the contracts, and to apply the rule that forfeitures are not favored, and that the construction must be against the party who prepared the contract. Can there be any doubt, under the evidence in this case, that the parties understood and agreed that the insurance furnished to McMaster was to be based upon the payment of premiums annually? Can there be any doubt that the company calculated the amount of the premiums on the basis of annual payments? Can there be any doubt that McMaster paid the sums demanded of him, and received the policies, upon the understanding that the subsequent premiums were to come due annually, and not at some shorter period? In short, can there be any doubt that both parties dealt with each other upon the express agreement that the first premium was to be paid down when the policies were delivered, and the second premium was to come due in one year? Can there be any doubt that upon the face of the application, which is an essential part of the contract between the parties, it is written that the provisions are to be payable annually? The policies are dated December 18, 1893, and did not take effect, actually or constructively, before that date. The premiums, being payable annually, are to be paid then,—the first as of the date of policies, and the subsequent premiums annually thereafter. But the company now claims that by its own

act it placed in the contracts a clause which enables it to demand the payment of the second premiums in less than one year from the date of the policies. Thus, the company, by its own act, and without the actual knowledge or assent of McMaster, has made these contracts of insurance self-contradictory; and, this being so, then the construction ought to be against the company, against the forfeiture, and in favor of that construction which carries out the real agreement and understanding which the evidence demonstrates existed between the parties to these contracts.

If free to give judgment according to my own view of the questions involved, I should find for the plaintiff; but, as already stated, the circuit court of appeals held in the equity case that there could be no recovery on the policies, at law or in equity, and I deem it my duty to follow this ruling, leaving it to the plaintiff to carry this action at law before that court for its further consideration; and therefore, while my opinion is with the plaintiff, the judgment must be for the defendant

YATES et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1898.)

No. 432.

1. SUITS BY UNITED STATES—EVIDENCE OF CREDITS—PROOF OF PRESENTATION OF CLAIM.

Under Rev. St. § 951, to render admissible evidence of a credit in a suit by the United States against an officer, unless brought within the exceptions therein stated, evidence in some form from the books of the treasury, showing that the claim, accompanied by the proper vouchers, has been presented to the accounting officers, is indispensable, and proof of such presentation cannot be made by parol.

2. SAME—SET-OFF—PROOF OF DISALLOWANCE.

In such suit any credit claimed by defendant, legal or equitable, whether arising out of the transaction sued on or not, may be allowed as a set-off; but to authorize the court to admit evidence of such claim it must be shown that it has been presented to the accounting officers of the treasury and disallowed, and, while no particular form of disallowance is essential, mere suspension of action is not a disallowance.

3. TRIAL—EXCEPTIONS TO INSTRUCTIONS—TIME FOR TAKING.

The correctness of instructions given or refused cannot be considered by an appellate court unless exception to the action of the trial court was taken before the jury retired.

4. REVIEW—INSTRUCTIONS—SUFFICIENCY OF RECORD.

A charge given by the court is presumed to have been applicable to the case made by the evidence, and cannot be reviewed unless the plaintiff in error presents to the appellate court all of the evidence, or all of that portion bearing on the point in controversy, with a statement in the bill of exceptions showing such fact.

In Error to the Circuit Court of the United States for the Northern District of California.

Barclay Henley and S. V. Costello, for plaintiffs in error.

Samuel Knight, Ass't U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an action against C. H. Yates, as United States Indian agent at Round Valley Indian Agency in California, and the sureties upon his official bond, to recover the sum of \$3,390.15. The case was tried before a jury, and resulted in a judgment being entered in favor of the United States for the sum of \$967.45. In the assignment of errors it is claimed that the court erred "(1) in rejecting the testimony supporting and disallowing the item of \$80 paid to Lillenthal & Co. for coal in the second quarter of 1890; (2) in rejecting the testimony in support of and disallowing the item of \$75 paid Thomas A. Cox & Co. for seeds purchased in the third quarter of 1890; (3) in disallowing the item, and the testimony in support thereof, of \$117.35 for services and expenses rendered and incurred by said defendant Yates in month of July, 1890, in traveling from the Round Valley Indian reservation in Mendocino county to a certain point in Shasta county,—all being done under the orders of the commissioner of Indian affairs issued to said Yates under date of June 12, 1889." There are a great number of other items in the assignments of errors, but the above are the only ones relied upon by the plaintiffs in error. From the bill of exceptions it appears that the case was regularly called for trial and a jury was impaneled on February 9, 1897; but, for reasons hereinafter stated, that jury was dismissed, and the case was tried before another jury on June 1, 1897.

The item of \$80 for coal had not been allowed by the accounting officers of the treasury department for the reason that "no vouchers are furnished in support of disbursements claimed; no evidence of payment has been furnished." In respect to this account the following testimony was given by Mr. Yates:

"Q. Mr. Henley: What have you to say about this item of \$80? A. I have a copy of the authorizing letter and Mr. Lillenthal's receipt. The Court: Where is the evidence that it was transmitted to Washington? A. I forwarded this bill that he sent me with my quarterly report to Washington. It probably could not be found. I have the authorizing letter for the purchase, and Mr. Lillenthal's receipt for the money. Mr. Henley: For \$80? A. Yes. Mr. Henley: We think that ought to be permitted to go to the jury. The Court: This case was continued for the very purpose of allowing Mr. Yates to employ some one to go to the treasury department, and get a transcript that would show that these vouchers had been presented, or rejected, or disallowed. I cannot permit this to go to the jury, and I shall have to sustain the objection to it."

The item of \$75 paid Cox & Co. for seeds was not allowed by the accounting officers of the treasury department because the "agent presents no receipt for alleged disbursement; no evidence of payment of \$75 furnished." In relation to this account Yates testified:

"I know I paid it at the time, and got a duplicate receipt, which I have here now. Mr. Knight: I object to that. Q. Has that ever been presented to the department? A. The original has. Q. Is there any evidence in this account that it has been so presented? A. Not that I know of. * * * The Court: I shall have to rule that out."

Section 951 of the Revised Statutes provides that:

"In suits brought by the United States against individuals no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the treasury, for their examination,

and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States or by some unavoidable accident."

In *U. S. v. Gilmore*, 7 Wall. 491, the defendant was a receiver of public moneys, and upon the trial claimed a credit for the hire of certain clerks employed by him as such depositary, and offered proof in support of the demand. The attorney of the United States objected to the admission of the evidence upon the ground that it must first be shown that the claim had been exhibited to the proper accounting officer of the treasury and disallowed, and that the exhibition and disallowance could be proven only by the certificate of such officer. The trial court stated that it would permit the evidence, and control the matter by instructions to the jury. Gilmore then testified that he "presented these claims to the accounting officer, and they were disallowed." The supreme court, after referring to the provisions of the statute above quoted, said:

"If the claims were not presented until after the account was closed upon the books of the treasury, still it was necessary to submit them for examination to both those officers [auditor and first comptroller]. The action of both was necessary. A transcript showing that action would have been sufficient. Parol evidence in such cases is wholly inadmissible. Evidence from the books of the treasury in some form is indispensable. * * * The court should not have permitted any proof of the claims to be given until the proper foundation for it had been laid. When the defendants failed to produce the evidence necessary to warrant the introduction of such testimony, all which had been given should have been excluded, and the claims withdrawn from the consideration of the jury. To allow them to remain in the case was an error, and any instruction given afterwards, short of their withdrawal, was unavailing to cure it. The course proposed to be pursued when the objection by the district attorney was taken could hardly fail, under any circumstances, to mislead and confuse, and to prevent the proper trial of the cause. * * * Whether the testimony in support of the claim was properly in the case was a question for the court, and not for the jury."

U. S. v. Giles, 9 Cranch, 212, 237; *Watkins v. U. S.*, 9 Wall. 759, 764; *Halliburton v. U. S.*, 13 Wall. 63, 65; *Railroad Co. v. U. S.*, 101 U. S. 543, 548; *U. S. v. Fletcher*, 147 U. S. 664, 667, 13 Sup. Ct. 434; *Alexander v. U. S.*, 6 C. C. A. 602, 57 Fed. 828, 832; *U. S. v. Patrick*, 20 C. C. A. 11, 73 Fed. 800, 805; *U. S. v. North American Commercial Co.*, 74 Fed. 146, 152; *U. S. v. Smith*, 1 Bond, 68, Fed. Cas. No. 16,321; *U. S. v. Duval*, Gilp. 356, Fed. Cas. No. 15,015.

No evidence was presented by the defendants which brought either of these items within the exceptions mentioned in the statute. The court did not err in its rulings in reference to these accounts.

The record in relation to the account of \$117.35, which was set up as a counterclaim to this action, is presented in such a confusing and unsatisfactory manner as to make it impossible to determine whether the account has been allowed by the government or not. The record shows that the government, in making out its case, introduced the transcript of accounts of defendant Yates as Indian agent, showing upon their face a balance due the government of \$3,390.15. But the transcripts of accounts are not embodied in the record, and there is nothing presented which shows what specific

accounts had been allowed by the accounting officers of the treasury. In the counterclaim set up by the defendant Yates there was a claim for an allowance against the government for \$160.15 for traveling expenses, consisting of two items,—one of \$117.35 and one of \$42.80. The bill of exceptions states that the documentary evidence introduced by the plaintiff showed that the only credit claimed by the defendant Yates as traveling expenses, disallowed by the accounting officers of the treasury department, and not allowed or found for the defendant, was an item of \$40.25. The statement of differences with reference to this item is as follows:

"This trip was made from agency to San Francisco, February 27 to March 10, 1887, to make new bond and deposit balance. The making of a new bond being a matter personal with the agent, the expenses attending it are not properly chargeable to the United States, and, there being no authority or necessity to make a trip to San Francisco to deposit funds, the amount is disallowed."

This statement, without comment, clearly shows that the court did not err in excluding this item.

The plaintiffs in error introduced a letter from acting commissioner of Indian affairs, dated Washington, July 12, 1890, addressed to C. H. Yates, Ukiah, Cal., as follows:

"Replying to your letter of the 27th ult., in which you ask that certain traveling expenses, amounting to \$160.15, incurred by you while agent at Round Valley agency, Cal., and which were approved by letters from this office of April 23 and May 29, 1890, be paid, you are informed that the money for these expenses cannot be placed to your credit, as you are no longer in service. You are advised to forward to this office the vouchers returned to you in the letters already quoted. When received, they will at once be forwarded to the accounting officer of the treasury, by whom payment will be made in the final settlement of your accounts.

"Respectfully,

J. T. Morgan, Commissioner."

With reference to this claim, the following proceedings then took place, as shown by the bill of exceptions:

"The Court: You got credit for that? A. No, sir. Mr. Henley: He ought to have it. Mr. Knight: What is the amount? A. Mr. Henley: \$160.15. The Court: It is allowed in the account. Mr. Henley: My impression is that there was another allowance in the account. * * * Mr. Henley: These two items (\$117.35 and \$42.80) are not allowed in the account, Mr. Yates? A. No, sir; that letter was received after I left the reservation."

Cross-examination: "Mr. Knight: What steps did you take to present your claim for traveling expenses set up in your counterclaim to the accounting officers at Washington? A. I forwarded the receipt for my expenses and a copy of the authorization for the trip I had made."

The witness further testified that his claims were forwarded to Washington before the letter of the acting commissioner, which is quoted above, had been sent; that the expenses were for a trip to Shasta county, as he was instructed to do; and stated that he had no evidence here of the fact that he sent on these vouchers by registered mail.

In the charge of the court to the jury, which was in all respects liberal to the defendants, some 20 or more items were specifically disallowed, including the item of \$40.25 for traveling expenses in giving bond. The court, with reference to these items, said:

"The total amount of these items, as I have them here, is \$942.86, for which there is no sufficient explanation or evidence sufficient to overcome the prima facie evidence of the transcripts. You will therefore find for the United States for this amount and interest, in any event. I now call your attention to certain items which are in dispute. You will add to this amount of \$942.86, which has been proven as an indebtedness, the amount of such other items as you may find he has not accounted for."

The court then enumerated specifically 30 or more items. In this enumeration are only 2 items for traveling expenses, as follows:

"In the second quarter of 1890, two claims are made for traveling expenses, one being in the sum of \$25.75, and the other for \$49.50. It is claimed that these expenses have been allowed by the commissioner of Indian affairs, and should have been allowed by the accounting officers."

At the close of the charge the following colloquy occurred between counsel and the court:

"Mr. Henley: Your honor did not say anything about the counterclaim. The Court: The counterclaim consists of the traveling expenses, which I have allowed in full. Mr. Henley: It is not adverted to here,—only a small portion, which I can give to your honor. The Court: Traveling expenses, \$40.25, for making a new bond, I do not allow, and have so instructed the jury. Mr. Henley: Then there is the amount of \$117 and something. It is not in this statement of differences. The Court: In the statement of differences there is a charge of \$25.75, and another of \$49.50, making \$75.25. I will leave it to the jury to determine whether the authorization you refer to covers those charges."

The court then read the letter of the commissioner, heretofore quoted, and said:

"I assume, Mr. Henley, that these charges for traveling expenses are the traveling expenses for which Mr. Yates has claimed credit. Mr. Henley: That is not so. I can show that to your honor in a moment. There are only two items of traveling expenses in this statement which have been disallowed. One of those items is embraced in the \$160. The Court: There is one item of \$40.25 for executing a bond which cannot be allowed. Mr. Henley: We are entitled to a credit of \$117. There cannot be any dispute about that at all. It is not mentioned any place in this statement of differences. I set it up as a counterclaim. The justice of it is admitted there by the letters from the Indian commissioner. The Court: I cannot further consider that now. I will leave it to the jury. There is no such identification of the items as will authorize the court to entertain the amount you mention as a counterclaim. The letter was written after Yates went out of office. Mr. Henley: And which he wrote for after he got out of office, because he had finished up his business then, and received that letter from the department. All I want is the allowance which the department says he is entitled to. * * * The Court: The most I can do is to allow you voucher No. 4 for the first quarter, 1890, \$25.75, and voucher No. 4 second quarter, 1889, for \$49.50, to go to the jury with the letter of July 12th. * * * Mr. Knight: It is impossible to identify these items with the authorization, because the very fault the department finds is that there were no vouchers submitted. Mr. Henley: The letter says vouchers were submitted and receipt acknowledged. There it is in that letter. The Court: 'You are advised to forward to this office the vouchers.' * * * You can take an exception to the court's charge. I cannot delay the case."

There is no competent evidence in the record that any voucher was presented to the accounting officers, as requested by the letter of the commissioner. All presumptions are in favor of the judgment. In order to secure a reversal or modification of the judgment the plaintiffs in error must affirmatively show that the item of

\$117.35 was disallowed, in whole or in part. This they have failed to do. The proper evidence to show that a claim has been disallowed by the accounting officer is by the transcript from the books of the treasury. No particular form is essential to the allowance or disallowance of a claim, but a mere suspension of action is not a disallowance. *U. S. v. Fletcher*, 147 U. S. 664, 667, 13 Sup. Ct. 434.

In *Watkins v. U. S.*, 9 Wall. 759, 765, the court said:

"Whether the claim for credit is a legal or equitable claim, if it has been duly presented to the accounting officers, and has been by them disallowed, it is the proper subject of set-off under that act, but it cannot be adjudicated in a federal court unless it has been so presented and disallowed. *U. S. v. Wilkins*, 6 Wheat. 143. The rejection of such a claim by the accounting officers constitutes no objection to it as a claim for set-off, as it cannot be admitted in evidence unless it has been presented and disallowed, as required by the act of congress. *U. S. v. Macdaniel*, 7 Pet. 11; *U. S. v. Ripley*, Id. 25. Such claims as fall within that act are not specifically defined, and in view of that fact this court has held that the act intended to allow the defendant the full benefit at the trial of any credit, whether it arises out of the particular transaction for which he was sued or out of any distinct and independent transaction which would constitute a legal or equitable set-off, in whole or in part, of the debt for which he is sued, subject, of course, to the requirement of the act that the claim must have been presented to the proper accounting officers, and have been by them disallowed. *U. S. v. Fillebrown*, 7 Pet. 48."

See, also, *U. S. v. Robeson*, 9 Pet. 319, 324; *Gratiot v. U. S.*, 15 Pet. 336, 371; *U. S. v. Eckford*, 6 Wall. 484, 491; *U. S. v. Patrick*, 20 C. C. A. 11, 73 Fed. 800, 807.

It is claimed that the court erred in failing to give certain instructions asked for by the plaintiffs in error; but it is not shown that any exceptions were taken thereto before the jury retired to deliberate upon their verdict, and, under the decisions of this court, we are not authorized to review the action of the court in this respect. *Bank v. McGraw*, 22 C. C. A. 622, 76 Fed. 930, 935, 936, and numerous authorities there cited; *Telegraph Co. v. Baker*, 29 C. C. A. 392, 85 Fed. 690.

With reference to the charge of the court to which an exception was allowed, the presumption is that it was applicable to the case presented by the evidence, unless there is something in the record to the contrary. The burden of proof to show error is upon the party who asserts it, and to maintain his position he must either present to the appellate court all of the evidence, so that the reviewing court can see for itself what the evidence was, or present in his bill of exceptions that portion of the evidence which bears upon the point in controversy, with a statement that no other evidence was submitted. As was said in *U. S. v. Patrick*, supra, "the plaintiffs in error have done neither." The judgment of the circuit court is affirmed, with costs.

ROBERTSON v. BLAINE COUNTY.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1898.)

No. 441.

1. LIMITATIONS—ACTION AGAINST COUNTY—LIABILITY OF FORMER COUNTY.

An action against a county to enforce a liability arising from an indebtedness of a former county charged upon the new county by the act creating it is upon a specialty created by the statute. As no liability against the new county could arise from the original obligation alone, such obligation is but an element in the cause of action, the statute being the other and indispensable element; hence limitation against such action runs only from the creation of the new county, and not from the maturity of the original debt.

2. SAME—INDEBTEDNESS PAYABLE FROM SPECIAL FUND.

A county cannot plead limitation to an action against it to enforce an obligation payable from a particular fund without first showing that it has provided such fund.

In Error to the Circuit Court of the United States for the District of Idaho.

This action was commenced September 30, 1897, by the plaintiff in error, to recover a judgment against the defendant in error for the sum of \$10,590, with interest, the amount alleged to be due on certain bonds and coupons issued by Alturas county, Idaho, under and in pursuance of an act of the legislature of the state of Idaho entitled "An act providing for the erection of a court house and jail at Hailey, the county seat of Alturas county," approved February 8, 1883. The bonds were issued May 1, 1883, and were made payable November 1, 1891. The legislature of Idaho, in 1895, passed an act entitled "An act to abolish the counties of Alturas and Logan, and to create and organize the county of Blaine," approved March 5, 1895. This act provides: Section 1: "The counties of Alturas and Logan are hereby abolished, and the county of Blaine is hereby created, embracing all of the territory heretofore included within the boundary lines of said Alturas and Logan counties." Section 7: "All valid and legal indebtedness of Alturas and Logan counties shall be assumed and paid by the county of Blaine." Section 8: "* * * All rights of action now existing in favor of, or against, said Alturas or Logan county, may be maintained in favor of or against Blaine county." Sess. Laws Idaho 1895, pp. 31, 33. It appears from the averments of the amended complaint: That the act authorizing the issuance of the bonds provided that "the board of county commissioners of said county shall, at the time of levy of county taxes, include therein a levy of sufficient tax to meet the interest and principal of said bonds as the same shall become due, and the tax so levied shall be known as the court-house bond tax, and shall be collected as other taxes are collected, and shall constitute a separate fund, and shall be used for no other purpose. And for the payment of said bonds, principal and interest, all the taxable property of said county is hereby pledged." That said bonds and coupons were, as they respectively matured, presented for payment to the treasurer of Alturas county, while it existed, and to the treasurer of Blaine county since the creation thereof, and payment thereon demanded by the holder thereof; and that the payment thereof, or any part thereof, was refused, on the ground that there was no money in the treasury applicable to their payment. That the commissioners of Alturas county neglected and refused to levy any tax to meet the interest and principal of said bonds as they became due. That on February 7, 1889, the legislature of Idaho divided Alturas county, and from its territory formed the counties of Elmore and Logan, and gave other portions to Bingham county, provision being made for apportioning the indebtedness, except the bonded court-house indebtedness, which was to remain the indebtedness of Alturas county. That on the 18th of March, 1895, the legislature of Idaho passed an act creating the county of Lincoln out of the territory of Blaine county, apportioning the indebtedness between said coun-

ties, the bonded court-house indebtedness of Alturas being included as part of the indebtedness of Blaine county. Since the creation of Lincoln county, such proceedings have been had that Blaine county has a judgment against Lincoln county for its proportion of said indebtedness, including the court-house bonded indebtedness of Alturas county. *Blaine Co. v. Lincoln Co.*, 52 Pac. 165. To the original complaint the defendant interposed a demurrer upon two grounds: (1) That the said complaint does not state facts sufficient to constitute a cause of action; (2) that the alleged cause of action in the complaint is barred by the provisions of section 4052 of the Revised Statutes of the State of Idaho. This section, in prescribing the time within which suit may be brought, reads as follows: "Sec. 4052. Within five years: An action upon any contract, obligation, or liability founded upon an instrument in writing." The court sustained this demurrer. *Robertson v. Blaine Co.*, 85 Fed. 735. The complaint was thereafter amended. A similar demurrer was interposed thereto, and sustained, and judgment thereafter rendered in favor of the defendant for its costs.

Selden B. Kingsbury, for plaintiff.

Lyttleton Price, for defendant.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts). Did the court err in sustaining defendant's demurrer? Is this action barred by the statute of limitations? The entire argument on behalf of the defendant clusters around the proposition that this is an action upon the original bonds, and not upon a debt growing out of them created at a subsequent date; that the act creating the county of Blaine simply provided that Blaine county should assume the payment of the bonded indebtedness of Alturas county; that it did not in terms create any new debt or obligation, but simply recognized the validity of the obligation created by Alturas; that there was no change as to the time when said bonds should become due; that Blaine county agreed to pay the bonds, stepped into the shoes of Alturas county, and was to pay just as Alturas would have paid them had it lived; that it assumed all the burdens and became invested with all the rights and privileges that Alturas would have possessed if Blaine county had not been created; that, if Alturas had continued to exist in the same condition it was when the bonds were issued, it could have successfully pleaded the statute of limitations. The proposition contended for is tersely stated in its brief as follows:

"If plaintiff has an action at all, it is not upon a new debt, nor a legislative debt, nor a new obligation, nor upon a specialty, nor a novation; it is the old debt of Alturas county. That county being dissolved, a new payor is created to discharge the obligation just as Alturas had it and left it."

If this contention is sustained, it necessarily follows that as the bonds became due November 1, 1891, and more than five years elapsed from that date before the action was commenced, the statute of limitations would apply. On the other hand, the plaintiff contends that the statute does not apply for various reasons, which are specifically stated by counsel as follows:

"(1) Because the duty of providing for and paying this debt was so imposed and assumed as to make the debtor county the donee of a power, and a

trustee of a direct, express, and continuing trust, unaffected by the statute of limitations.

"(2) Because the act authorizing and requiring the creation of this debt provided for the levy of a special tax, and created a special fund, which tax was never levied, and which fund never contained any moneys; nor was any money ever in the treasury of the debtor county applicable to the payment of this debt.

"(3) Because of new promises; of renewal of the indebtedness; of many subsequent acknowledgments of the debt; and because of the creation of a new legislative obligation and debt upon the defendant county, based upon the original debt, and into which the original debt is merged.

"(4) Because of the new promises and acknowledgments embraced in and implied in legislative acts and legal proceedings thereunder; of the making provision for the payment of said indebtedness; of the apportioning of the same, and creating legislative debts upon other counties than the debtor county, to aid the debtor county in the payment of the same.

"(5) Because of statutory provisions requiring a new county to pay its proportionate share of any bonded indebtedness outstanding against the parent county, and requiring such payments to be used only in aid of paying such bonded indebtedness; and because of various acts, suits, and proceedings done, instituted, and undertaken by the debtor county to secure aid from other counties in obtaining funds on account of and for payment of this indebtedness.

"(6) Because of the various acts of the legislature regarding said indebtedness, regarding the county which created the same, regarding other counties created out of said county, regarding the funding of the indebtedness, regarding the apportionment of the indebtedness; and because of acknowledgments and promises made and necessarily implied in various suits, actions, and legal proceedings had and taken concerning said indebtedness by the defendant county, and the result of the same."

What is the character of this action? How should it be classified? Is it an action upon a contract, obligation, or liability founded upon an instrument in writing? No action could be maintained against Blaine county upon the bonds and coupons issued by Alturas county except by force of the act of the legislature approved March 5, 1895. It is by virtue of the provisions of this act that plaintiff seeks to maintain this action against defendant. The liability or obligation of Blaine county to pay the bonds and coupons issued by Alturas county did not, and could not, arise except by legislative action. Under the provision of the act organizing and creating the county of Blaine, it assumed and agreed to pay "all valid and legal indebtedness of Alturas" county; and in said act it was provided "that all rights of action now existing in favor of or against said Alturas * * * county may be maintained in favor of or against Blaine county." The bonds and coupons at that time were a part of the "valid and legal indebtedness" of Alturas county, which Blaine agreed to pay. Its liability was then fixed and determined. The bonds and coupons issued by Alturas county constitute an important ingredient in the action, but they are not all of the case. As against Blaine county, they are but matters of inducement to the action. All these things must be taken into consideration in determining the character, cause, and nature of this action. It is not simply an action upon a contract made with, or an obligation or liability created by, Alturas county. The act abolishing Alturas county, and creating the county of Blaine, is as essential to the plaintiff's right of action as is the fact of the

issuance of the bonds in the first instance by the county of Alturas. The cause of action is the bonds issued by Alturas, and the statute which fixes the liability of the county of Blaine for their payment. In order to state his cause of action, the plaintiff was required to plead, and, if the case was tried, would be compelled to prove, both the issuance of the bonds and the statute whereby Blaine county agreed to pay them. Neither pleaded alone would constitute a cause of action in favor of plaintiff against defendant. It is the nature of the whole cause of action which determines the applicability of the statute of limitations.

So far as Blaine county is concerned, the bonds are but the evidence of the valid and legal indebtedness of Alturas, which it agreed to pay. The debt was originally to be paid by Alturas county. Blaine county, except for the provisions of the statute referred to, could not be held answerable for the debt; but, by the act, new obligations were created, and the manner of payment was changed. To recapitulate: The statute created a debt, duty, or obligation against Blaine county, to recover a portion of which this action is brought; but, in order to show a cause of action against Blaine county, it devolved upon the plaintiff to allege the issuance of the bonds by Alturas county, and their nonpayment, because the existence of such facts was necessary in order to show that they constituted a part of the valid and legal indebtedness of Alturas county, which Blaine county, by virtue of the provisions of the statute, became liable to pay. This debt, or obligation, or whatever it may be called, is in the nature of a specialty, and, in our opinion, is not barred by the provisions of section 4052 of the Revised Statutes of Idaho.

The legal principle which controls this question is not new. It is found in leading text-books, and in a great variety of decided cases,—in relation to the jurisdiction of courts, to the different character and causes of action, as well as to the construction of the statute of King James, and to different state statutes of limitation. It has been applied to actions of debt created partly by contract and partly by statute, as well as to debts created solely by statute. The cases, although different in their facts, are all more or less akin in principle to the present case, and the general trend of all analogous cases is substantially in the same vein, and is in accord with the views we have expressed. *Bullard v. Bell*, 1 Mason, 243, Fed. Cas. No. 2,121; *Van Hook v. Whitlock*, 3 Paige, Ch. 409; *Cowenhoven v. Board*, 44 N. J. Law, 232; *State v. Baker Co.*, 24 Or. 141, 145, 33 Pac. 530; *Pease v. Howard*, 14 Johns. 479; *Lane v. Morris*, 10 Ga. 162; *Higby v. Calaveras Co.*, 18 Cal. 176, 179; *Andrews v. Bacon*, 38 Fed. 777; *Barling v. Bank*, 1 C. C. A. 260, 50 Fed. 260, 262; *Richards v. Bickley*, 13 Serg. & R. 395, 399; *Jordan x. Robinson*, 15 Me. 167; *Railway Co. v. Goode*, 13 C. B. 826; 1 Wood, Lim. Act. §§ 19, 36, 38, 39, 40a; Ang. Lim. 79, 80.

In 1 Wood, Lim. Act. § 39, it is said that:

"The test by which to determine whether a statute creates a specialty debt or not is whether, independent of the statute, the law implies an obligation to do that which the statute requires to be done, and whether independently

of the statute a right of action exists for a breach of the duty or obligation imposed by the statute. If so, then the obligation is not in the nature of a specialty, and is within the statute; * * * but, if the statute creates the duty or obligation, then the obligation thereby imposed is a specialty, and is not within the statute."

Apply this test to the present case. Independently of the statute, the law does not imply any obligation upon Blaine county to pay the debt; nor, independently of the statute, could any right of action be maintained against Blaine county. But the statute does create the duty or obligation on Blaine county to pay the same, and "the obligation thereby imposed is a specialty," and is not within the provisions of the statute of limitations pleaded herein.

Railway Co. v. Goode was an action of debt by a railway company against one of its members, for calls, under the authority of an act of parliament; and the plea was that such causes of action did not accrue within six years; and this plea was confronted by a demurrer. The argument in the case on the one side went upon the ground that the liability of the defendant, which gave the right of action, was the creature of the statute, while in opposition it was insisted that the sole liability was founded upon an implied contract.

Jervis, C. J., said:

"I think it is an action upon statute. * * * But for the act of parliament, no action could be brought by the company against one of its own members. This, therefore, is an action brought in respect of a liability created by statute, and therefore is an action founded upon the statute, and the plea which relies upon the six-years limitation is no answer to it."

Maule, J., said:

"A declaration in debt upon a statute is a declaration upon a specialty; and it is not the less so because the facts which bring the defendant within the liability are facts dehors the statute. That must constantly arise in actions for liabilities arising out of statutes. * * * The allegation in the plea that the action is upon contracts without specialty is a false allegation of a matter of law. * * * I think it manifestly appears that this is an action of debt, and upon the statute, and therefore an action upon a specialty."

The other judges concurred in this view.

In *Lane v. Morris*, a stockholder pleaded the statute of limitations in an action brought against him upon his liability for the debts of a corporation. The court held that the cause of action was founded on the statute creating his liability, and numerous authorities were there cited "to sustain the position that an action of debt, founded upon a statutory liability, has never been considered as being within the statute of limitations of 21 Jac. I. c. 16, of England, or of the like statutes in this country, but that such statutory liability has always been regarded in the nature of a specialty." And in the course of the opinion the court said:

"There can be no doubt that the liability of the defendant, as a stockholder, for the ultimate redemption of the bills of the bank, is created by the eleventh section of the statute incorporating the Planters' and Mechanics' Bank of Columbus. Without that section in the act, he would not be liable to the plaintiff, as a holder of the bills of the bank."

In *Bullard v. Bell*, Mr. Justice Story held that the statute of New Hampshire did not apply as a bar to an action of debt against a stockholder of a bank under the provisions of its charter imposing a personal responsibility upon the shareholders for the notes of the institution in case they should be dishonored. There, as here, the action was brought upon a liability created, not merely by the original parties, but by the express terms of the statute. In the course of the opinion the learned justice said:

"I agree at once to the position that the bills of the bank are to be considered originally as the debts of the corporation, and not of the corporators; and, except for some special provision by statute, the latter cannot be made answerable for the acts or debts of the former. * * * Whatever is enjoined by a statute to be done creates a duty on the party, which he is bound to perform. The whole theory and practice of political and civil obligations rest upon this principle. When, therefore, a statute declares that, under certain circumstances, a stockholder in a bank shall pay the debt due from the bank, and those circumstances occur, it creates a direct and immediate obligation to pay it. The consideration may be collateral or not, but it is not a subject-matter of inquiry. * * * Here, then, the law has declared that the stockholders shall be liable to pay a specific sum, and it imposes on them a duty so to do. * * * The law has created a direct liability,—a liability as direct and cogent as though the party had bound himself under seal to pay the amount, in which case debt would undoubtedly lie. The law esteems this an obligation created by the highest kind of specialty."

In *Van Hook v. Whitlock*, which was a suit against the stockholders for the debt of the corporation, the court, in discussing the question as to the statute of limitations, among other things, said:

"If the debts were actually due from the corporation at the time of its dissolution, it can make no difference whether they were due from the corporation by judgments, or specialty, or only by simple contract. The right of action against the stockholders is founded upon the statute; and the form of the action against them must be the same, whatever may be the nature of the original indebtedness of the company. If an action at law is brought against the stockholders, it must be either an action of debt or assumpsit, founded upon their liability created by the statute."

In *Barling v. Bank*, it was contended that the action was founded upon the assignment of certain bills of exchange; but the court held that it was founded on the liability created by section 322 of the Civil Code of California, which provides for the individual liability of the stockholders for the debts of a corporation. Deady, J., in delivering the opinion of the court, said:

"But the present action is not really founded on an assignment of the bills, but on the liability created by said section 322 of the Civil Code. In this action the assignment of the bills of exchange is a mere ingredient or inducement. By reason or means thereof the plaintiff became and was a creditor of the Alaska Improvement Company. In this condition the statute operated, and gave it a right of action against the defendant, as stockholders of the corporation, for the amount of its claim against the latter. This was an original right, then created, which did not exist before or otherwise."

In *Angell on Limitations*, it is said:

"That where the liability of the defendant is created, not merely by the act of the parties, but by positive requisitions of the statute, the plaintiff is not barred."

Under the law of Idaho, the statute of limitations may run against a specialty. Section 4054, p. 437, Rev. St. Idaho, reads as follows:

"Within three years: (1) An action upon a liability created by statute, other than a penalty or forfeiture." But this action was commenced within less than three years after the act was passed making Blaine county liable for the indebtedness of Alturas. An action against a county upon which the legislature has imposed a duty of paying the indebtedness of the county out of which territory it was carved does not stand precisely in the same condition as an individual who assumes and agrees to pay the debt of another person. The liability in the case against the county is created by a statute, and the other by the voluntary act of the individual. It is true that the right to sue or be sued attaches, under the statute of most of the states, to a county the same as to an individual. But it is not true that debts created by statute are placed upon the same plane as debts created by a contract. Numerous illustrations of this principle might be given; for instance, the constitutional provision that no county shall create any debts or liabilities which shall exceed a specified sum does not necessarily imply that all debts and liabilities against the county over and above that sum are in violation of such provision. Counties, as is well known, do not create all the debts and liabilities they are under. Debts and liabilities are, ordinarily, imposed upon them by law. A county is often said to be a mere agency of the state government,—a function through which the state administers its affairs; and it frequently has but little, if any, option in the creation of debts and liabilities against it. It is for these or similar reasons that courts have generally held that this provision of the constitution only applies to such debts and liabilities as the county in its corporate capacity and character, like an individual, voluntarily creates.

In whatever light this case may be viewed, it must always be admitted that the liability of Blaine county to pay the valid indebtedness of Alturas county, which existed at the time Blaine county was organized, is a liability created by the statute. No twisting of words, no reference to the facts, no analogy drawn from any of the decided cases, will permit any denial of this proposition. Concede, for the purpose of the argument, that, if Alturas county had continued to exist, it could have successfully pleaded the provision of the statute of limitation pleaded in this case; it does not follow that Blaine county could plead it because its liability is fixed definitely by the statute, and has nothing to do with the special character of the indebtedness of Alturas county. It is wholly immaterial whether plaintiff's claim was a judgment, an ordinary indebtedness for services rendered or supplies furnished, or a "contract, obligation, or liability founded upon an instrument in writing"; the liability of the defendant in either event is created by the statute, and the limitation, and the only limitation which the defendant can plead, must begin at or after that date, because that is the date its liability first began.

In *Board of Com'rs of Custer Co. v. Board of Com'rs of Yellowstone Co.*, 6 Mont. 39, 47, 9 Pac. 586, 590 (which was a case growing out of a legislative act [Laws 1883, p. 119] creating the county

of Yellowstone from what had formerly been Custer county and a small portion of Gallatin county, and the act provided that the indebtedness of the county of Custer existing at that time should be apportioned between the two counties by the commissioners), in passing upon certain questions involved therein, the court said:

"The indebtedness, if any, is one wholly created by the statute. Without a provision for the existence of such indebtedness by the respondent, the liability for the whole of the indebtedness of Custer county, as it existed immediately before the creation of Yellowstone county, would rest upon the appellant. * * * When, by the terms of this act, did this indebtedness arise? Section 2 of the act provides that the indebtedness of the county of Custer, as the same shall exist on the 1st day of March, 1883, shall be apportioned between the said county and the county of Yellowstone, and then the provisions for the manner of the apportionment follow. This was not merely the recognition of a moral right in Custer county, and a corresponding moral obligation upon Yellowstone county in respect to this indebtedness, to be afterwards erected into a legal right and corresponding legal obligation by the action of the county commissioners of both counties at their meeting on the first Monday of March, 1883, as provided in section 3; but it was then and there the creation, upon the first day of March, 1883, of a legal right in Custer county to have paid to it, and a legal obligation upon Yellowstone county to pay to the appellant, in the manner provided in the act, its proportion of the indebtedness as it existed upon the 3d of March, 1883."

See, also, *Cheyenne Co. Com'rs v. Bent Co. Com'rs*, 15 Colo. 320, 329, 25 Pac. 508; *Canyon Co. v. Ada Co. (Idaho)* 51 Pac. 748; *People v. Hulbert*, 71 Cal. 72, 12 Pac. 43.

The views already expressed are conclusive upon the questions involved herein. But there is another principle which we also believe to be applicable to this case which leads to the same result. The bonds and coupons herein sued upon were, by the statute authorizing their issuance, payable out of a particular fund, which was never provided for by Alturas county. The provisions of this statute imposed a continuing duty (*Elmore Co. v. Alturas Co. [Idaho]* 37 Pac. 349), and became a part of the contract between Alturas county and its bondholders (*Von Hoffman v. City of Quincy*, 4 Wall. 535, 554; *Mobile v. Watson*, 116 U. S. 289, 305, 6 Sup. Ct. 398; *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190; *Gasquet v. Board*, 45 La. Ann. 342, 12 South. 506; *Bassett v. City of El Paso [Tex. Sup.]* 30 S. W. 893; *Maenhaut v. New Orleans*, 2 Woods, 108, Fed. Cas. No. 8,939, and authorities there cited; *Cooley, Const. Lim.* 355). The facts alleged in the complaint bring this case within the general rule that, when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the statute of limitations without first showing that the particular fund has been provided, or that the particular method prescribed by statute has been complied with. It is true that, in the cases cited by plaintiff's counsel where this principle is announced, there was either an amendment to the original act, or a new law providing a different method of levying and collecting the necessary tax to create a fund out of which the bonds or coupons should be paid.

Defendant, in this connection, contends that, in the cases cited upon this point, the obligation was created by the statute, while

in this case "only the right of action is given by statute." It would, it seems to us, be more accurate to say that the statute not only gives the right of action against Blaine county, but creates an obligation upon Blaine to pay the debt. In so far as the principle of law is involved, what difference does it make whether an amendment is made to the law, as to the levy and collection of a special tax to pay the indebtedness, or the passage of a new and independent act which casts the burden of payment upon another county? In both cases the right of action might be said to be upon the bonds; but in both a new obligation or liability is created, either as to the indebtedness or the method of collecting the same. In neither can the debt be paid unless provision is made for a fund applicable to its payment. A well-settled principle of law should not be cast aside simply because the case in hand is not "on all fours" with the decided cases in which it has been applied. Facts often change. The principle of law remains the same. It is unusual or rare that cases are found precisely alike in the facts; but it is quite common to find a principle of law applicable by analogy and reason to varied conditions as to the facts.

The general principle referred to is clearly stated in *Lincoln Co. v. Luning*, 133 U. S. 529, 532, 10 Sup. Ct. 363, 364, where the court said:

"The remaining question arises on the statute of limitations. By the general limitation law of the state, some of the coupons were barred; but there has been this special legislation in reference to these coupons. The bonds were issued under the funding act of 1873. In 1877 the county was delinquent in its interest, and the legislature passed an act amendatory to the act of 1873. This amendatory act provided for the registering of overdue coupons, and imposed upon the treasurer the duty of thereafter paying the coupons as money came into his possession applicable thereto, in the order of their registration. *St. Nev. 1877, p. 46.* The coupons, which by the general limitation law would have been barred, were presented, as they fell due, to the treasurer for payment, and payment demanded and refused, because the interest fund was exhausted. Thereupon the treasurer registered them as presented, in accordance with the act of 1877; and, from the time of their registration to the commencement of this suit, there was no money in the treasury applicable to their payment. This act providing for registration and for payment in a particular order was a new provision for the payment of these bonds, which was accepted by the creditor, and created a new right upon which he might rely. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to pay such coupons as were registered, in the order of their registration, as fast as money came into the interest fund; and such promise was by the creditor accepted; and, when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided."

In support of these views, the court cites *Underhill v. Trustees*, 17 Cal. 172; *Freehill v. Chamberlain*, 65 Cal. 603, 4 Pac. 646.

In *Freehill v. Chamberlain*, it was argued that as the coupons in question matured, according to their face, on the 1st of January, 1872, the statute of limitations bars any proceeding on the part of petitioner to enforce payment; that, if the proper amount of taxes were not levied in any one year, such levy should have been com-

pelled by mandamus; that, if any step necessary to have the proper funds in the treasury had been omitted, a proceeding to compel such step was the proper course. The court, in reply to this contention, said:

"We do not understand this to be the law as applicable to this case. According to the act of April 25, 1863, * * * no action could be maintained against the city on these bonds or coupons. By law, it was the duty of the city to make provision for the payment of the bonds and coupons according to the statute under which they were issued; and, by omitting to perform such duty, the city could not create the defense of the statute of limitations. Not until the funds were in the treasury, properly applicable, would the statute begin to run. Not until that period would the petitioner have any right of action or proceeding against the treasurer. The contrary view would place it in the power of a municipality in many cases to avoid all payment of its debts, because if, by concert of action, each officer should omit to perform his duty, the time consumed in compelling each to perform such duty might be made to consume all the period of the statute before the funds would reach the treasury. We do not think the legislature intended such result."

See, also, *State v. Board of Comr's of Lincoln Co.*, 23 Nev. 262, 45 Pac. 982; *Sawyer v. Colgan*, 102 Cal. 283, 292, 36 Pac. 580; *Spaulding v. Arnold*, 125 N. Y. 194, 198, 26 N. E. 295; *Gasquet v. Board*, 45 La. Ann. 342, 12 South. 506; *King Iron Bridge & Mfg. Co. v. Otoe Co.*, 124 U. S. 459, 8 Sup. Ct. 582.

Alturas county was not at the time of its dissolution in such a condition that it could have pleaded the general statute of limitations herein relied upon.

We do not deem it necessary to examine any of the other grounds discussed by the plaintiff in error. After a careful consideration of all the questions involved herein, we are of opinion that the section of the statute of limitations pleaded and relied upon by defendant does not apply, and was not intended by the legislature to apply, to a case like the present. The court erred in sustaining the demurrer. The judgment of the circuit court is reversed, and cause remanded for further proceedings, not inconsistent with this opinion.

PACIFIC BANK v. HANNAH et al.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1898.)

No. 400.

1. BILL OF EXCEPTIONS—TIME FOR ALLOWANCE.

The filing of a bill of exceptions during the term of court at which judgment is rendered is sufficient to preserve the rights of a party, and to authorize its allowance and settlement after the term.

2. POWER OF ATTORNEY—REVOCATION BY DEATH OF PRINCIPAL.

A power of attorney to convey land, not coupled with an interest, is revoked by the death of the principal, and a deed thereafter made by the attorney is void.

3. PARTITION BY DEED—VALIDITY.

An attempted partition of land, by deed inter partes, is void where one of the deeds is invalid, and does not bind the owner of the interest it purports to convey.

4. JUDGMENT AS ADJUDICATION OF TITLE—EFFECT OF DECREE OF PARTITION.

A decree making partition of land, in a suit which was not adversary as to the title of the different parties, is not conclusive of the title of one of the parties to whom a share was allotted, as against claimants who were not parties.

5. DESCENT OF PROPERTY—DEATH OF NONRESIDENT OWNER OF LAND—RIGHTS OF WIDOW.

Under Laws Wash. 1862-63, pp. 261-264, §§ 340, 352, on the death intestate of a nonresident owner of land in the territory, his widow did not inherit as an heir at law, but for want of other heirs the land escheated to the county in which it was situated, subject only to the dower right of the widow during her life.

6. DOWER—CONVEYANCE BEFORE ASSIGNMENT.

The widow of a deceased owner of land in Washington territory, who never resided in the territory or state, and to whom dower in such land was never assigned, had no interest in the land which she could convey.

In Error to the Circuit Court of the United States for the District of Washington.

This is an action in ejectment, brought by the Pacific Bank, plaintiff in error here, for about four acres of land situated in the county of Pierce, state of Washington. The complaint alleged ownership in fee, and a right to the possession of the land, and that the defendants were in unlawful possession thereof. The defendants pleaded a general denial, and set up that the county of Pierce, state of Washington, was the owner of said land, and that they were in possession by consent of said Pierce county. The evidence introduced on the part of the plaintiff was entirely documentary. The plaintiff deraigns its title as follows: In February, 1870, a tract of 60 acres of land, described as the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, of section 5, township 20 N., of range 3 E., of Willamette meridian, in the county of Pierce, then territory, now state, of Washington, was conveyed by Louis C. Fuller and Clinton P. Ferry, and their respective wives, who were the owners in fee simple thereof, to the Workingmen's Joint-Stock Association, a corporation organized under the laws of the state of Oregon, and having its principal office at Portland, in said state. At that time, and on the 10th of February, 1871, following, the stockholders, and the only stockholders, of this corporation were the following: John Donaldson, Philip Francis, Charles Gilbert, James H. Givens, Charles Howard, John Huntington, George Washington, George Thomas, George Luviney, William Brown, Mary H. Carr, Edward S. Simmons, George P. Riley, and Anna Rodney, and each was the owner and holder of $\frac{30}{464}$ of all the capital stock of the corporation, except George Luviney, who was the owner and holder of $\frac{85}{464}$ of said capital stock, and William Brown, who was the owner and holder of $\frac{30}{464}$ of said capital stock. On the 10th day of February, 1871, a question having arisen as to the power of the corporation to take and hold the title to said real property, it was decided by the officers and managers of the same that the said land should be conveyed to the said stockholders individually, as tenants in common of their interests therein, in proportion to the amount of capital stock owned and held by each; and accordingly, on said day, the corporation joined with said Louis C. Fuller and Clinton P. Ferry, and their respective wives, and duly made, executed, and delivered to said stockholders hereinbefore mentioned a quitclaim deed to said real estate, in the proportions represented by the stock held by them in the corporation, to be held by them as tenants in common. Among these stockholders and tenants in common was one James H. Givens, whose interest was stated, in the deed, to be $\frac{30}{464}$, and whose interest represents the land in controversy in this action, amounting to about four acres. On September 5, 1871, 11 of these tenants in common, among whom was James H. Givens, joined in a power of attorney in favor of John W. Matthews, who was constituted and appointed "our true and lawful attorney for us, and in our name and stead, to grant, bargain, sell, convey, alien, remise, release, quitclaim, assign, or transfer all such lands," etc., "and for all the powers aforesaid for

us and in our names to make, execute, acknowledge, and deliver all necessary deeds," &c. The names of the remaining three tenants in common were affixed by other parties, but no previous authority to do so was shown. The purpose of this power of attorney, it appears, was to effect a partition of this 60-acre tract; and Matthews accordingly, on September 9, 1871, attempting and assuming to act under said instrument in writing, executed to said stockholders hereinbefore mentioned a deed signed by himself as attorney in fact, conveying to each a portion of the 60 acres represented by his or her interest in said corporation. But it seems that the initial corner of the description of the land attempted to be conveyed was incorrectly stated in said deeds, and furthermore the deeds were signed by the name of John W. Matthews, and not by the names of any of said alleged grantors, and were otherwise incorrect and void. See opinion of the court below in the case of McDonald v. Donaldson, relating to this same tract of land, 47 Fed. 765. Subsequently, and about February 14, 1873, James H. Givens died intestate, leaving Mary A. Givens, his wife, surviving him. On March 24, 1873, Matthews, still assuming to act under the authority of said power of attorney and without any additional authority, executed, acknowledged, and delivered a second set of deeds to each of said stockholders (excepting James H. Givens), which correctly stated the section in which the said tracts, so partitioned, were situated, and the true initial corner of the description in each, and to which he signed the names of several of the stockholders as grantors therein. Matthews deeded the tract in controversy in this case to Givens' widow, Mary A. Givens. As stated, Givens had died in the month of February previous, intestate, without leaving any heirs. It was, however, assumed at the time that, under the laws of the territory, now state, of Washington, his widow was his heir at law. It was upon this assumption that the deed of the tract of land to which Givens would have been entitled, had he lived, was conveyed by Matthews to Mary A. Givens, his widow. Subsequently, on October 17, 1888, Mary A. Givens, describing herself as the "widow of James H. Givens," executed a quitclaim deed of the entire 60-acre tract to Frank V. McDonald. In the year 1891, McDonald instituted a suit in equity in the United States circuit court for the district of Washington, Western division, against those of the original tenants in common who still retained their interests and against those persons who claimed title to any part of the premises by deed from any of the original tenants in common. The object of the suit was to obtain a decree defining the interests of the several parties, remove the cloud upon the title, and partition the property among the owners, so as to give to each his portion thereof in severalty. The importance of just such a suit to disentangle the title to this entire 60-acre tract from the complications which the careless and misadvised acts of the parties had caused, is very forcibly stated by the learned judge of the court below in his opinion in that case. McDonald v. Donaldson, *supra*. It was held that the land had not been legally partitioned, and that the only solution of the legal difficulties and perplexities of the situation was for the court to partition the land itself, according to the fairest plan which the court, acting upon certain equitable principles, could devise. This was accordingly done. In the findings of fact in that case, the court found "that on the 23d day of March, 1873, the said James H. Givens died intestate, leaving Mary Givens his widow and only heir at law," and awarded the land in controversy here to McDonald, as the grantee of Mary Givens. Subsequently, McDonald brought suit against Dolphus B. Hannah and Kate E. Hannah, his wife, the present defendants in this case, in the circuit court of the United States for the district of Washington, Western division, to recover possession of the land involved in the case at bar. McDonald, the grantor of the present plaintiff in the case at bar, pleaded, in that action, to establish his title to the land and right to have Hannah et ux. dispossessed, the judgment and decree rendered in the case of McDonald v. Donaldson, 47 Fed. 765. But the court held that, while such decree and judgment were admissible in evidence in favor of the plaintiff's title, it was not conclusive upon the defendants, they having been strangers to the suit in which such judgment and decree were rendered; and the court further held that, upon the evidence presented and the showing made in that case, the title held by McDonald to the land in controversy

in this case was void and of no effect; that Mary A. Givens, the widow of James H. Givens, never had the legal or any title to the land which she could convey to McDonald; that she was not, under the laws of the territory, now state, of Washington, the heir at law of James H. Givens; that, upon the latter's death, the only right she acquired in the land in controversy was that of dower, and nothing more; that the land had never been awarded to her in any proceeding according to the statute for assignment of dower. Judgment was accordingly rendered for the defendants. 51 Fed. 73. Subsequently, on February 11, 1896, McDonald conveyed the land in controversy to the Pacific Bank, the plaintiff in the court below and the plaintiff in error in this court. The case was tried before the court below, the parties having, by written stipulation filed, waived a jury. Judgment was rendered in favor of the defendants, and the court made the following findings of facts and conclusions of law:

"First. That plaintiff is a banking corporation organized and existing under the laws of the state of California, and authorized to hold real estate in the state of Washington, and the defendants are citizens and residents of the state of Washington.

"Second. That in the year 1840 one James H. Givens intermarried with one Mary A. Peck at New Bedford, in the state of Massachusetts, and the said parties never resided in the late territory, now state, of Washington.

"Third. That on the 14th day of February, 1873, the said James H. Givens died intestate at Portland, in the county of Multnomah, state of Oregon, leaving surviving him his widow, the said Mary A. Givens, but no issue or heir at law.

"Fourth. That at the time of his death the said James H. Givens was seised in fee of one undivided $\frac{30}{464}$ of the following described premises, to wit: The southwest quarter (S. W. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$), and the west half (W. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) of the northwest quarter (N. W. $\frac{1}{4}$), of section five (5), township twenty (20) north, of range three (3) east, of Willamette meridian, in the county of Pierce, then territory, now state, of Washington.

"Fifth. That on the 17th day of October, 1888, the said Mary A. Givens, widow of said James H. Givens, claiming to be the sole heir at law of said James H. Givens, made, executed, and delivered to one Frank V. McDonald a conveyance of all her right, title, and interest, including dower and claim of dower, in and to the premises above described, but that neither before the making of said conveyance nor thereafter had the interest of said Mary A. Givens, as the widow of said James H. Givens, been set off to her by any court.

"Sixth. That thereafter, and on or about the 12th day of March, 1891, the said Frank V. McDonald, claiming, by virtue of said conveyance, to be the owner of the right, title, and interest of said James H. Givens and Mary A. Givens in and to the premises hereinbefore described, commenced, in this court, a suit in equity against one John Donaldson and sundry other persons, to which all persons having of record in the office of the auditor of Pierce county any deed of conveyance, decree, or other evidence of title to any portion of said premises were made parties defendant, save and except that the defendants herein and the county of Pierce were not parties thereto, for the purpose of procuring a partition of said premises among the parties to said action; and thereafter such proceedings were had in such cause that this court ordered and decreed, as between the parties to said action, a partition of said premises, and particularly decreed that there be set off in severalty, as his sole and exclusive property in fee simple to Frank V. McDonald as the successor in interest of said James H. Givens and Mary A. Givens, a certain tract or parcel of the tract hereinbefore described, therein bounded and described, and being the same tract of land described in the complaint herein.

"Seventh. That thereafter, and on the 13th day of September, 1894, said Mary A. Givens died in the city of Portland, county of Multnomah, state of Oregon, being at the time of her death a resident of said state of Oregon.

"Eighth. That thereafter, and on the 11th day of February, 1896, the said

Frank V. McDonald made, executed, and delivered to the plaintiff herein a conveyance of the premises described in the complaint herein.

"Ninth. That the premises described in said complaint exceed in value the sum of two thousand dollars (\$2,000).

"Tenth. That the county of Pierce is a municipal corporation of the state of Washington.

"Eleventh. That the defendants are, and were at the time of the commencement of this action, in possession of the premises described in the complaint by consent of the said county of Pierce, state of Washington."

As conclusions of law, from the above findings of fact, the learned judge held:

"First. That, upon the death of said James H. Givens, the right, title, and interest of said James H. Givens in and to the premises described in the fourth finding of fact herein became vested in the county of Pierce, state of Washington, as escheated property, subject only to a dower estate in his widow, said Mary A. Givens, for her life, in one-third thereof, to be admeasured to her pursuant to the laws of the then territory of Washington.

"Second. That the conveyance by Mary A. Givens to Frank V. McDonald, and the conveyance by Frank V. McDonald to the plaintiff herein, did not vest either of said grantees with any right, title, or interest in said premises.

"Third. That the partition proceedings referred to in finding sixth herein were valid and effectual to the extent that the decree therein severed the undivided interests of the parties to said action in the premises described in the fourth finding of fact herein, and particularly the interest of which the said James H. Givens died seised, but were void so far as they conferred, or attempted to confer, any right, title, or interest in the said Frank V. McDonald to the premises described in the complaint herein.

"Fourth. That the defendants are entitled to a judgment against plaintiff dismissing this action, and for their costs and disbursements herein."

The plaintiff in error excepted to the findings of fact Nos. 3, 5, and 11, and to all the conclusions of law, and excepted to the action of the court in refusing to adopt the findings of fact and conclusions of law requested and submitted by it, and in rendering judgment for the defendants, all of which is assigned as error. To reverse the judgment of the court below, this writ of error is sued out.

T. L. Stiles and George E. De Steiguer, for plaintiff in error.

W. C. Sharpstein, for defendants in error.

Before MORROW, ROSS, and GILBERT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts). A motion has been made to dismiss the writ of error on the ground that the bill of exceptions, although filed within the term at which judgment was rendered, was not presented to, and allowed by, the judge of the court below until after the expiration of the term. We think that the fact that the bill of exceptions was filed within the term at which judgment was rendered is sufficient to preserve the rights of a party in presenting the bill of exceptions for allowance and settlement. *U. S. v. Breitling*, 20 How. 252; *Dredge v. Forsyth*, 2 Black, 563, 568; *Davis v. Patrick*, 122 U. S. 138, 7 Sup. Ct. 1102; *Chateaugay Ore & Iron Co., Petitioner*, 128 U. S. 544, 9 Sup. Ct. 150; *Hume v. Bowie*, 148 U. S. 245, 253, 13 Sup. Ct. 582; *Waldron v. Waldron*, 156 U. S. 361, 378, 15 Sup. Ct. 383; *Woods v. Lindvall*, 1 C. C. A. 34, 48 Fed. 73.

While the assignments of error are fifteen in number, they can be said to raise but three general questions of law, which will be determinative of the errors claimed: (1) Whether the conveyance from Matthews to Mary A. Givens, her husband, James H. Givens, hav-

ing died, operated to vest in her any title which she could convey to McDonald to the land in controversy; (2) whether she was, under the laws of the territory, now state, of Washington, an heir of James H. Givens, and, as such, succeeded to all his right, title, and interest to the same; and (3) what is the force and effect, in this case, of the decree of the court below rendered in the partition suit of McDonald v. Donaldson, 47 Fed. 765, wherein it was held that Mary A. Givens was an heir of James H. Givens, and, as such, succeeded to all the right, title, and interest which the former had in the land in controversy, and that her conveyance to McDonald of such interest was valid and operative?

As to the first question, we are of the opinion that the conveyance by Matthews, under his power of attorney, to Mary A. Givens, was absolutely null and void. The conveyance was made after the death of Givens, and the power of attorney, under which the pretended conveyance was made to Mary A. Givens, not being coupled with an interest, was revoked by the death of Givens. *Hanrick v. Patrick*, 119 U. S. 156, 174, 7 Sup. Ct. 147; *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Louis v. Elfelt*, 89 Cal. 547, 26 Pac. 1095; *Rowe v. Rand*, 111 Ind. 206, 12 N. E. 377; *Story*, Ag. § 489. See, also, *McClaskey v. Barr*, 50 Fed. 712. That being true, the conveyance by Matthews to Mary A. Givens, the widow of James H. Givens, was void, and her transfer to McDonald equally so. The attempted partition was inoperative and void, for it is well settled that a voluntary partition, which is not binding on all the co-tenants, is not binding on any. *Sutter v. City and County of San Francisco*, 36 Cal. 112; *Gates v. Salmon*, 46 Cal. 361; *Hill v. Den*, 54 Cal. 7; *Center v. Davis*, 113 Cal. 307, 45 Pac. 468. This principle was recognized by the court below in the cases of McDonald v. Donaldson, 47 Fed. 765, and McDonald v. Hannah, 51 Fed. 73; in the former of which cases, as previously stated, the court held the attempted partition void, and proceeded to make an equitable partition of the land. In so doing, it partitioned the interest in the land of James H. Givens, deceased, as one of the tenants in common, to Mary A. Givens, his widow, upon the assumption that she was his sole heir at law.

This brings us to the consideration of the second and third questions involved, which will be considered together. The case of McDonald v. Donaldson, *supra*, is relied on by the plaintiff in error as settling the question that Mary A. Givens was entitled, as heir at law of James H. Givens, to the land in controversy, and that her conveyance to McDonald and that by the latter to the plaintiff in error are valid. Aside from the fact that none of the present defendants, nor the county of Pierce, from whom they claim to hold possession, were parties to that suit of partition, it appears that the question whether or not Mary A. Givens was the sole heir at law of James H. Givens was not raised or mooted in that suit. To be sure, it was involved in the case; for, James H. Givens being dead, the court below, in making its equitable partition of the entire tract of land, had to make some disposition of Givens' interest as a tenant in common, and, in so doing, no question appearing to have been raised about it, assumed that Mary A. Givens, his widow, was also,

under the laws of the territory, now state, of Washington, his sole heir at law. That the court assumed that Mary A. Givens was the heir at law of James H. Givens, and, therefore, entitled to the land in controversy in this case, and that it was in error in this assumption, is established by the decision of the same court in the subsequent case of McDonald v. Hannah, *supra*. In that case the question was directly raised and determined. That case purported to involve the same land in controversy in the case at bar, the same defendants, and was also an action in ejectment. The only difference, which is one merely of form, is that plaintiff's grantor was plaintiff in that case. It was also an action of ejectment, and substantially the same grounds were urged for and against the proposition that Mary A. Givens was the sole heir at law of James H. Givens, and therefore succeeded to all his right, title, and interest. The learned judge of the court below, in that case, thoroughly considered this question, and, in holding that she was not his sole heir at law, used the following language:

"The land in controversy is part of the tract involved in the case of McDonald v. Donaldson, 47 Fed. 765 (recently determined in this court). The husband of Mary A. Givens, with other persons, acquired the title to said tract as tenants in common, and by transactions between themselves and a succession of untoward occurrences, as shown by the published statement and opinion of the court in that case, the title became snarled; one of the most serious complications being caused by the death of Givens, which occurred in the year 1873. Being nonresidents, the statutes of the territory in relation to the property rights of married persons enacted prior to his death were inapplicable to Mr. and Mrs. Givens, and conferred no rights upon the widow. Neither was she, by the laws then in force, entitled to take any part of her husband's real estate by inheritance. The partition deed made to her by Matthews as attorney in fact was void, for the reason that, by the death of her husband, the power of attorney under which Matthews acted was annulled. She had a right of dower, and nothing more. But the demanded premises have not been awarded to her in any proceeding according to the statute for assignment of dower. Therefore her grantees acquired no right, title, or right of possession by the deed from her, even if the execution, delivery, and validity thereof be assumed."

That decision was rendered in 1892. An appeal was taken to this court, and the judgment was reversed on a question of pleading, and the case remanded for a new trial. See 8 C. C. A. 426, 59 Fed. 977. We are not advised by the record what, if anything, further was done in that case. The case can, therefore, not be considered as controlling in this court. An independent examination, however, of the law on the question as to whether Mary A. Givens was the sole heir at law of James H. Givens, involved in this case and in the previous case of McDonald v. Hannah, satisfies us that the court below was correct in so far as it held that Mary A. Givens could not be considered, under the laws of the territory, now state, of Washington, the sole heir at law of James H. Givens. A perusal of the opinion of this court, reversing the judgment of the lower court in that case, will show that the ground of reversal was not based on the question whether or not Mary A. Givens was the sole heir at law of James H. Givens. With reference to the weight to be given the previous decision of McDonald v. Donaldson, wherein the court be-

low assumed that Mary A. Givens was the sole heir at law of James H. Givens, the learned judge thus expressed himself:

"The defendants are not, however, concluded by said decree, nor can they be denied their day in court to put in issue the validity of plaintiff's pretended right to the demanded premises, and subject the same to the test of a judicial determination. Neither the defendants nor the heirs or legal representatives of Givens were in court as parties to the partition suit, and by the course pursued by those who were parties the court was precluded from investigating or deciding the questions affecting the plaintiff's pretended title now in issue. In view of these facts, the court could not, by its decree, create a new and original title, nor divest the true owner of his title to the premises, and against the parties in actual possession the decree affords no ground for a judgment of ouster."

The views expressed by the learned judge of the court below in the case of *McDonald v. Hannah* were undoubtedly correct.

A further reason why that case is not conclusive is that the parties are not the same. None of these defendants, nor the county of Pierce, from whom the defendants claim, were made parties to that suit. The court below, however, very properly admitted the judgment and decree in that case in the present case. It was admissible in favor of plaintiff, but was not conclusive upon the defendants. *Barr v. Gratz's Heirs*, 4 Wheat. 213; *Delano v. Bennett*, 90 Ill. 533; *Benefield v. Albert* (Ill. Sup.) 24 N. E. 634. Besides, a decree of partition does not operate to create or divest a title to land. Its purpose is to divide and set apart to each of the tenants in common his or her respective share or portion. That was, manifestly, all that the equitable partition made by the court below, in *McDonald v. Donaldson*, of the tract of land, of which a portion thereof is in controversy in this case, was intended to and could do. It did not purport to create a title where none existed, nor to divest a title which had accrued or attached. As was said in *Wade v. Deray*, 50 Cal. 376, 380:

"It is well settled that a decree or judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the cotenants any new or additional title. After the partition each had precisely the same title which he had before, but that which before was a joint possession was concerted into a several one."

See, also, *McBrown v. Dalton*, 70 Cal. 89, 11 Pac. 583; *Traver v. Baker*, 15 Fed. 186.

In so far as the decree of partition in the case of *McDonald v. Donaldson* operated to do this, it was valid and binding; but when it purported to create in Mary A. Givens a title, right, or interest in the land which, by the laws of the territory, now state, of Washington, she did not possess, it follows that it was, to that extent at least, inoperative and void. By the death of James H. Givens, intestate, and without heirs, his widow not being, as has already been seen, his heir at law under the laws of Washington, his estate escheated to the county of Pierce. *Laws Wash. 1862-3*, pp. 261-264, §§ 340, 352; *Abb. Real Prop. St.* pp. 375-377; *Territory v. Klee*, 1 Wash. St. 183, 188, 23 Pac. 417; 6 Am. & Eng. Enc. Law, pp. 856, 857, and cases there cited. The court below was, therefore, right in finding that Mary A. Givens had no title, right, or interest, at law, in the

land in controversy, which she could convey, and that the conveyance by her to Frank V. McDonald, and the conveyance by Frank V. McDonald to the plaintiff in error herein, did not vest either of said grantees with any right, title, or interest in said premises. It is true that the escheat was subject to the dower right of Mary A. Givens during her life. It appears, from the seventh finding of fact, that she died in the city of Portland, Or., on September 13, 1894, being at the time a resident of said state. It further appears that she never resided in the late territory, now state, of Washington. As it does not appear that her right of dower was ever set off to her, it follows that she acquired no right to convey the land, and that her conveyance to McDonald, even of her dower right, would have been null and void. Such being the state of the case, it follows that the plaintiff in error could not succeed in its action of ejectment against the defendants, for it must recover on the strength of its own title. *Marsh v. Brooks*, 8 How. 223, 233, 234; *Sabariego v. Maverick*, 124 U. S. 261, 8 Sup. Ct. 461; *Trenouth v. Gordon*, 63 Cal. 379; *Townsend v. Estate of Downer*, 32 Vt. 183; *Dyke v. Whyte*, 17 Colo. 296, 29 Pac. 128. The defendants were not mere trespassers. They pleaded possession from the county of Pierce, and proved that they held such possession by virtue of some written agreement from the county of Pierce. The plaintiff in error failed to prove any possession, but relied entirely on its paper title. The judgment of the circuit court is affirmed.

NORTHERN PAC. EXP. CO. v. METSCHAN.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1898.)

No. 428.

1. STATUTES—SUBJECTS NOT EXPRESSED IN TITLE.

The title, "An act to license and regulate insurance business," is insufficient to cover a clause repealing statutes referring to both the insurance and express business, so far as those statutes apply to the express business.

2. SAME—TITLE OF AMENDING ACT.

Const. Or. art. 4, § 22, providing that "no act shall ever be revised or amended by mere reference to its title, but the act revised or sections amended shall be set forth and published at full length," refers merely to the body of the act or section, and does not require that an amendment to an existing act have a new title.

3. SAME.

Trivial errors in describing the title of the original act, which cannot mislead, will not invalidate the amendatory act.

In Error to the Circuit Court of the United States for the District of Oregon.

This is an action to recover 50 bonds of the city of Portland, in the state of Oregon, known as "Portland Water Bonds," or the value thereof, \$70,000, in case delivery cannot be had. The complaint is based upon the provisions of the Oregon statutes for an action in the nature of replevin to recover specific personal property. The complaint states, substantially: That "plaintiff is a corporation duly incorporated, organized, and existing under and by virtue of the laws of the state of Minnesota, and is a citizen of the state of Minnesota, and is engaged in the express business in the state of Oregon.

That the defendant is a citizen and resident of the state of Oregon. That the plaintiff is the owner and is entitled to the immediate possession of fifty bonds of the city of Portland, known as 'Portland Water Bonds,' to wit, numbers 256 to 305, inclusive, each of the face value of \$1,000, with interest coupons attached thereto. That the value of the said bonds is \$70,000. That the defendant wrongfully and unlawfully detains the said bonds, and keeps possession thereof, within the state and district of Oregon, although plaintiff has frequently demanded the same from the defendant. That the defendant is the duly elected, qualified, and acting state treasurer of the state of Oregon, and that the defendant pretends to have power, by virtue of the said office, to hold the said bonds, and to keep the possession thereof, in order that he may collect and receive certain fees and emoluments allowed to the state treasurer by law for the safe-keeping of bonds and securities required by law to be kept in the custody of the state treasurer, but that in fact [and] in truth he is not empowered by any law to hold or keep possession of the said bonds, or to exact or to collect any fees or emoluments for keeping them. That the said defendant claims that he is entitled to so hold possession of the said bonds as a deposit from plaintiff under and by virtue of sections 1, 2, and 3 of an act of the legislative assembly of the state of Oregon entitled 'An act to amend an act to regulate and tax foreign insurance and express corporations or associations, doing business in this state,' approved October 21, 1864, amended and approved December 19, 1865, and which said section is printed in the compilation of the Miscellaneous Laws of the State of Oregon compiled and annotated by Matthew P. Deady and Lafayette Lane (1872) at page 616 thereof; the same being section 1 of chapter 24 of the Miscellaneous Laws of the State of Oregon. But the plaintiff alleges that the said sections of the said statute have been repealed by section 25 of an act of the legislative assembly of the state of Oregon entitled 'An act to license and regulate insurance business in the state of Oregon,' filed in the office of the secretary of state February 25, 1887, and which is in effect by operation of the constitution of the state of Oregon. That the defendant so holds and keeps possession of the plaintiff's said property without due or any process of law, and in violation of the rights guaranteed to the plaintiff by the constitution of the United States. That by reason of the premises the plaintiff is damaged in the sum of seventy thousand dollars (\$70,000)." A demurrer was filed by the defendant to this complaint on the ground that the same does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and a judgment entered dismissing the complaint. For the alleged error in sustaining the demurrer and entering the judgment this writ of error is prosecuted.

The act of the legislature of the state of Oregon entitled "An act to regulate and tax foreign insurance, banking, express, and exchange corporations or associations, doing business in this state," approved October 21, 1864, provided, in section 1, that no foreign corporation or association should be permitted to transact the business of life, fire, or marine insurance, brokerage, exchange, or express, within the limits of the state, without first complying with the provisions of section 2 of the act. Section 2 required that every such corporation, before doing the business of life, fire, or marine insurance, or banking, brokerage, exchange, or express, should deposit with the treasurer of the county in which the principal office or agency is located the sum of \$50,000. Section 3 required that such deposit should be made in the interest-bearing bonds of the United States, and should be safely kept for the benefit and security of persons transacting business with such corporations or associations in the state, for claims and demands arising out of said business, and should be held and considered specially pledged for such security for such claims and demands. Gen. Laws Or. 1845-1864, compiled and annotated by M. P. Deady (page 745). In 1865 the legislature passed an act entitled "An act to amend an act entitled 'An act to regulate and tax foreign insurance and express corporations or associations doing business in this state,' approved October 21, 1864." This act was approved December 19, 1865. Its purpose appears to have been to exempt life insurance, banking, and exchange corporations from the requirements of the act of 1864; and it sought to accomplish this purpose by omitting from the title of the original

act the words "banking" and "exchange," and from the body of the statute the words "life," "banking," and "exchange." Another amendment was to require that the deposit should be made in interest-bearing bonds of the United States, "or the bonds of the state of Oregon." Laws 1865, p. 21. By an act approved October 24, 1870, the legislature amended the act of 1864 as amended by the act of 1865. The title of this act is, "An act to amend an act entitled 'An act to regulate and tax foreign insurance and express corporations or associations doing business in this state,' approved October 21, 1864; amended and approved December 19, 1865." The purpose of this amendatory act was to require that the deposit of \$50,000 should be made with the treasurer of the state, instead of the treasurer of the county, in which the principal office or agency is located, as provided in the original act. The words "banking" and "exchange" were again omitted from the title of the original act. Laws 1870, p. 46. In 1887 the legislature passed an act entitled "An act to license and regulate insurance business in the state of Oregon." It was provided in section 6 of this act that every foreign corporation, before engaging in the business of fire or marine insurance or express, should deposit with the treasurer of the state the sum of \$50,000; and it was further provided that the deposit should be made in interest-bearing bonds of the United States, or the bonds of the state of Oregon, or any municipal, school district, county, or town, bonds, issued by legal authority in the state of Oregon, the market values of which are at or above par. The purpose of this act was to re-enact the statutes in force regulating the insurance and express business, and to so amend the same as to give to the corporations named the privilege of depositing certain bonds of a local character in lieu of national and state bonds, as required by previous acts. It also provided, in section 25, that sections 1, 2, 3, and 16, c. 24, of the Miscellaneous Laws of Oregon, and acts and parts of acts in conflict therewith, should be thereby repealed. Laws 1887, p. 118. The sections repealed were section 1 of the act of 1870, section 3 of the act of 1865, and section 4 of the act of 1864. Section 20, art. 4, of the constitution of the state of Oregon, reads as follows: "Every act shall embrace but one subject, and matters properly connected therewith, which subjects shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." Section 22, art. 4, provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length." Hill's Ann. Laws Or. pp. 90, 91.

Crowley & Grosscup and Carey & Mays, for plaintiff in error.
C. M. Idleman, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after making the statement of the case as above, delivered the following opinion:

As the provision of section 6 of the act of 1887 relating to express companies is not included in the title of the act, and is not properly connected with the subject of that title, it is clearly void as to express companies, under section 20 of article 4 of the constitution of the state. But the defendant does not base his right upon that provision. His claim is that he has the right to retain the bonds in his possession by virtue of the act of October 21, 1864, amended and approved December 19, 1865, and as further amended by the act approved October 24, 1870. Gen. Laws Or. 1843-72, p. 616, compiled and annotated by Matthew P. Deady and Lafayette Lane. The plaintiff claims that this statute was expressly repealed by section 25 of the act of 1887, providing for the repeal of sections 1, 2, 3, and 16, c. 24, of the Miscellaneous Laws of Oregon. It is conceded that such

was the purpose of section 25, but it is contended that, as the subject of such repeal was not expressed in the title of the act of 1887, the section is ineffective to accomplish that purpose. The constitutional requirement that every act shall embrace but one subject, which must be expressed in the title, is not violated by an omission to mention in the title of an act, relating to a single subject, the repeal of prior acts inconsistent with the new enactment, if the repealing clause is also confined to repealing statutes relating to that one subject; but when the repealing clause departs from the subject embraced in the title of the act, and purports to repeal a statute relating to a subject not indicated by such title, it comes within the prohibition of the constitution, and must be treated as void and of no effect as to the subject not mentioned in the title. The title of the act of 1887 is, "An act to license and regulate insurance business in the state of Oregon." This title embraces but one subject, and relates to a particular class of business. It does not purport to regulate the express business, or to in any way legislate upon that subject; and when, therefore, we find in the body of the statute the express business made subject to the same regulations as the insurance business, we are compelled to treat such legislation as unconstitutional and void. This proposition is, however, not in controversy in this case. The substantial contention of the plaintiff is that the act of 1887 is a new statute covering the whole subject embraced within the provisions of the previous acts, and that, to give effect to the legislative intent, the repealing section must necessarily include the acts repealed. But this is not a question of legislative intent. If it were, we would be compelled to give effect to the entire statute, and hold that foreign corporations engaged in the express business are as much subject to the provisions of the act as those engaged in the insurance business. Nor does the question of validity relate to any particular part of the act of the legislature. The question is, does the act embrace a subject not expressed in the title? If it does, so much of the act as relates to that subject is void, whether it is found in the body of the act, or in the repealing clause. In the act under consideration, the title relates only to the insurance business; but in the body of the act the express business is also included and regulated, and in the repealing clause statutes are repealed which refer to and govern the express business as well as the insurance business. Under the constitutional provision referred to, it is plainly the duty of the court to declare so much of this statute as relates to the express business unconstitutional and void.

The second proposition of the plaintiff in error is that the law under which the defendant claims the right to hold the bonds in question has no validity because it was never properly adopted. That is to say, the act approved October 24, 1870, was amendatory of previous acts requiring the deposit to be made with the county treasurer, instead of with the state treasurer, and the amendatory act requiring the deposit to be made with the treasurer of the state failed because it did not properly describe the act amended. The first act was approved October 21, 1864, and was entitled "An act to regulate and tax foreign insurance, banking, express and exchange corporations or associations

doing business in this state." The second act was approved December 19, 1865, and was entitled "An act to amend an act entitled 'An act to regulate and tax foreign insurance and express corporations or associations doing business in this state.'" The act of 1870 is entitled "An act to amend an act to regulate and tax foreign insurance and express corporations doing business in this state, approved October 21, 1864; amended and approved December 19, 1865." The first amendatory act, in reciting the title of the original act of 1864, omits the words "banking" and "exchange," as contained in the latter act; and it is claimed by the plaintiff that by this omission the original act was not sufficiently described. It is also claimed that the act of 1870 is void for the same reason, and also because the title purports to amend an act which has already been suspended. The words "banking" and "exchange" appear to have been omitted from the title of the original act as recited in the amendatory act for the purpose of making the entire statute, including the title, read as it was intended to stand after it was amended. Possibly this treatment of the title of the original statute was supposed to be in accordance with the requirements of the constitution, that "no act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length." Const. Or. art. 4, § 22. It has been generally understood that this provision refers to the body of the act or section, and that an amendment to an existing act requires no new title. *Oregon v. Phenline*, 16 Or. 107, 109, 17 Pac. 572.

The reference to the title of the original act was therefore not accurate, but it was not such an error as was calculated to mislead the reader as to the purpose of the amendment. Trivial errors in describing the title of the original act, which cannot mislead, will not invalidate the amendatory act. *People v. Howard*, 73 Mich. 10, 40 N. W. 789.

This statute, as amended by the act of 1865 and by the act of 1870, appears to have been set forth and published as required by the constitutional provision. Laws 1870, p. 46, and Gen. Laws Or. 1843-72, p. 616, compiled and annotated by Matthew P. Deady and Lafayette Lane. This was sufficient, and disposes of plaintiff's objections to both amendatory acts. *Oregon v. Phenline*, supra. The judgment of the circuit court is affirmed, with costs.

ASHLEY v. QUINTARD et al.

(Circuit Court, N. D. Ohio, W. D. October 3, 1898.)

No. 1,424.

1. REMOVAL OF CAUSES—APPEARANCE—WAIVER OF OBJECTION TO SERVICE.

A nonresident defendant, served only by publication in a proceeding in rem by attachment, by a removal of the cause to the federal court does not waive the right to move to vacate the service on the ground that the court did not obtain jurisdiction over the property sought to be reached.

2. GARNISHMENT OF FOREIGN CORPORATION — ACTIONS AGAINST NONRESIDENT STOCKHOLDER.

Shares of stock in a corporation of one state, owned by a resident of another, cannot be reached by garnishment in a third state in which the corporation does business, by service of garnishment on the agent of the corporation in the state and of summons on the defendant stockholder by publication, in the absence of special statutory provision therefor; and a statute subjecting foreign corporations to suits and garnishment in the state as a condition precedent to their doing business therein, in connection with one authorizing attachments in suits against nonresidents, does not confer such authority. Such statutes, as affecting corporate garnishees, apply only to debts due from the corporation generally, or to property held by it within the state; and a corporation is not a debtor of its stockholders in such sense that it may be garnished as such, nor does it hold their stock except at the place where it has its domicile, and subject to the laws of such place.

3. SAME—STATUTES AFFECTING FOREIGN CORPORATIONS.

State statutes subjecting foreign corporations to the service of process and to suits and garnishment within the state as a condition of their right to do business therein cannot be held to also require by implication that their shareholders shall submit their shares of stock to the dominion of the state.

4. SAME—OHIO STATUTES.

Though the Ohio statutes authorize the attachment of stocks and interests in stocks, and permit the garnishment of a foreign corporation doing business in the state in actions against nonresident defendants, and also require a corporation garnishee to make disclosure of any stock held therein for the benefit of the defendant, such statutes presuppose that the debts or property to be subjected, and to which the disclosures relate, are within the dominion of the state, and do not bring within such dominion shares of stock in a foreign corporation, whether the corporation as garnishee makes disclosure of their ownership by defendant or refuses to make such disclosure.

5. SAME—SITUS OF CORPORATE STOCK.

The situs of corporate stock for any purpose must be either the domicile of the corporation or that of the owner. Whether for the purpose of seizure and subjection to legal process it can be elsewhere than the domicile of the corporation, *quære*.

On Motion to Vacate Service.

Appearing only to make this motion, certain of the defendants ask to vacate a service by publication of an attachment writ, and to discharge the attachment. The suit was brought in the state court, and removed here by one of the defendants. That defendant, the Ann Arbor Railroad Company, has answered, but there has been no service of the summons upon Quintard and others of the defendants, and only by the attachment and publication involved in this motion have they been brought in, if at all. There seem to have been two writs, one from the state court before removal, and the other from this court after removal, but the question here made concerning each is the same. The attachment was served in Lucas county, Ohio, upon the defendant the Ann Arbor Railroad Company, by garnishment, to which that defendant has answered, saying that it is a corporation of the state of Michigan, operating a line of railroad partly in Michigan and partly in Ohio, only a small part of its property being located in the state of Ohio. This garnishee's answer also states the defendants Quintard and others, making this motion, are citizens and residents of New York; that each owns the amount of the common or preferred stock of the Ann Arbor Railroad Company set opposite his name in the garnishee's answer; and that the garnishee has no other property whatever of the said defendants in its possession or control. This is all that appears by the garnishee's answer. It is stated in the motion that the company has "its principal office in Durand," in the state of Michigan, but this is not sworn to by any one. However, by

the seeming agreement of counsel in argument it is generally understood that the company has an office in New York City, where the stock books are kept, and transfers are made, and other financial operations conducted; that it has its terminal offices at Toledo, Ohio, where most of its administrative or operative offices are kept, but its corporate headquarters are at the village of Durand, in Michigan. The details of these matters are not shown, as no affidavits have been submitted in support of or against the motion.

C. W. Everett, John J. Kumler, and Charles S. Ashley, for plaintiff.
Smith & Beckwith and Clarence Brown, for defendants.

HAMMOND, J. (after stating the facts). Technically, perhaps, this motion should be decided solely upon the answer of the garnishee, which is not at all full in its statement of the facts, though it sufficiently appears by that document that the defendants are citizens of New York and nonresidents in Ohio, while the railroad company is only a Michigan corporation. But even that is not stated in the answer of the garnishee, but rather stands upon the agreement of counsel in argument that it is not incorporated in Ohio as it might be in both states. We find the fact to be that it is solely a Michigan corporation. It seems to be conceded by counsel for the motion that the shares of stock would be leviable either in Michigan, the corporate domicile of the company, or in New York, the residence of the owners of the shares. Apart from any authoritative adjudication on the subject, it is not very clear, considering the nature of shares of corporate stock, if it be leviable in New York, why it may not likewise be leviable in Ohio, or any other state, if service could be had upon the garnishee company. Merely because the debtors in execution or attachment reside in New York, and because that state may be taken as the situs of the shares for some of the purposes of ownership, such as the peculiar nature of the property permits,—as, for example, bequest by will or distribution after death intestate, or for taxation, and the like,—it does not follow that the shares may be subjected to the process of execution or attachment in that state, any more than other tangible or intangible personal property the debtors might own which happened, in fact, to be within the boundaries of the state of Michigan; wherefore the ultimate logic of the doctrine contended for by counsel for the motion must be that shares of stock are leviable only in the state where the company has its corporate domicile, or else in any state where there can be service on the company. Public policy would seem to favor the former rule, particularly as to quasi public corporations, and those which, like railroads, are practically perpetuated in their existence in one way or another. It would be a convenience and source of safety to have one place only to which all might resort to effectuate by sale under judicial process any enforced change of title or ownership of the shares. If that should require the plaintiff here to go first to New York for his judgment, and then to Michigan for another judgment, it would only be a result common to legal procedure; and the same result that would be found necessary if the same debtors owned other property located in Michigan. Perhaps one suit in Michigan, the corporate domicile, furnished by a law of that state authorizing nonresidents to be sued as to any property located there, might suffice. The case of *Jellenik v. Mining Co.*, 82

Fed. 778, is not against this doctrine, but rather in favor of it. There our Brother Severens held that plaintiffs, claiming that the shareholders held their shares fraudulently as against them, could not, in Michigan, try that question with shareholders nonresident there, under the laws of Michigan in that behalf. They first must go to the state of residence, settle the title there, and then to Michigan to compel a transfer, if the personal jurisdiction over the shareholders at their residence would not secure complete relief by compelling the transfer there. The truth is that the peculiar characteristic of shares of stock, united with the misfortune of having one's debtor owning property in foreign parts, combine to present difficulties in litigation concerning the shares which cannot be overcome, except in some such manner as that suggested by Judge Severens. Possibly they may be insuperable difficulties without special legislation to remedy them, but that is the reason for the existence of legislatures,—to provide remedies as the necessities for them arise. It does not follow from his decision that executions and attachments against nonresident shareholders cannot be had in Michigan. If so, however, it only shows that further legislation may be needed there to give relief as against nonresident shareholders in Michigan corporations.

Even if it should result that shares in a corporation in another state than that in which the debtor resides cannot be subjected to execution or attachment for his debts, because there can be no personal service of summons on and judgment against him in that state upon which to base an execution, and that no attachment could be made effectual, that should not influence the courts in deciding such questions as this, for the reason that they can neither legislate nor impress a different quality upon property than it possesses inherently from the sources of its creation or origin. One must deal with the corporation itself in some form to subject shares of stock to judicial process against their owners, and it may be difficult to find the corporation for that purpose elsewhere than in the corporate domicile, particularly since the latest decisions of the supreme court seem to establish that it can have only one domicile or habitation for the purposes of suits against it, so far as federal jurisdiction is concerned, at least. *Railroad Co. v. James*, 161 U. S. 545, 563, 16 Sup. Ct. 621; *Railroad Co. v. Steele*, 167 U. S. 659, 17 Sup. Ct. 925; *U. S. v. Northwestern Exp. Stage & Transp. Co.*, 164 U. S. 686, 689, 17 Sup. Ct. 206; *Steamship Co. v. Kane*, 170 U. S. 100, 106, 111, 18 Sup. Ct. 526; *Railway Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401; *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935; *In re Keasbey*, 160 U. S. 221, 229, 16 Sup. Ct. 273. Under the existing judiciary act, the plaintiff, being an inhabitant of Ohio, might have brought this suit in this court originally, but he would have required personal service to reach the defendants. Having sued them in the state court, he might attach any property of theirs found in Ohio, and the question is whether his attachment has found their shares of stock in a Michigan corporation in Ohio. If it has not, they may move here to discharge the service made in the state court. *Railway v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126.

How did the shares of stock become located in Ohio, and subjected to the quite absolute dominion of the laws of that state over any prop-

erty situated within its boundaries? Certainly, if the corporation is not an Ohio corporation, the shares are not here in that sense. If the owners are not citizens of Ohio, they are not here in the sense that the situs of the shares is that of the domicile of the owners. They can be here, then, only because the corporation is doing business in Ohio, and operates a railroad within its limits. Can that fact operate to bring all the shares of all its stockholders within the dominion of Ohio, any more than it brings any other or all of their personal belongings here? We have seen that it does not operate to make the corporation itself an "inhabitant" of Ohio, so as to subject it to suit in the federal courts of Ohio as such "inhabitants." The plaintiff may sue it, if he can find service here, only because he himself is an inhabitant of Ohio, not because the company is an inhabitant here. Why, then, should its doing business here by permission of the state of Ohio bring here the shares of its stock, which do not belong to it, but to other people, when it does not itself become domiciled here? If it be true—as it is—that the laws of Ohio require as a condition of doing business in the state that the company shall submit to be sued here by process upon its officers doing its business within the state, it does not follow that those laws require the shareholders to submit their shares of stock to the dominion of Ohio, and thereby subject them to execution and attachment within that state. The laws do not say this in express terms. If the state has the power to attach such a condition to the license of doing business in the state, it should expressly define the condition, and it is not necessarily to be implied from any statutes authorizing process against the company itself nor from any authorizing the property of nonresidents to be attached. The subjection of the shares of the stockholders to execution or attachment, or of the shareholders themselves to any kind of suit within the state, not connected with some liability of the company, is a subject-matter entirely foreign to the subject-matter of process against foreign corporations. It does relate, indeed, to the attachment laws, but it would be hard to hold that attachment statutes, without express words to that effect, should be construed to impose, as a condition of foreign corporations doing business in the state, a requirement that all its shareholders should be personally suable by the attachment of their shares if nonresidents, when that ownership is altogether foreign to the business of the company,—just as foreign as such a suit would be in its relation to shares of stock in any other company whatever that the nonresidents might happen to own, or as it would be to any other kind of property they might happen to possess. Without such a requirement, express or implied, it is impossible to find a location within Ohio of the shares of stock of a Michigan corporation belonging to nonresidents of Ohio.

The company is liable to process by garnishment, undoubtedly; but when it answers that the defendant in attachment is one of its shareholders it might as well have said that it had in its hands the property of the defendant debtor, but that it was held by the company within the state of Michigan, and not within the state of Ohio,—locomotives, let us say, used wholly within the state of Michigan, or within the state of New York, where the debtors reside,—if it be a proper ruling

that the situs of the shares, as to their individual ownership, follows the domicile of the owner. In that case the answer of the garnishee amounts to saying that the property in its hands is held by it for the owner in the state where the owner resides. There it may be reached by equitable, or, possibly, legal, attachment or execution; the owner, if in no other way, being enjoined in equity, after judgment at law, from disposing of the shares, and these being sold under direction of the court to satisfy the judgment; or, if need be, and right there were before judgment, be attached by like equitable proceeding, after the common custom of courts of equity in granting relief where there is no remedy at law. It would greatly depreciate the value of the property, and deter investments in these quasi public enterprises, if the shares of stock are to be dragged into every state which the corporation enters to do business, and be at one and the same time in all those states, for the purposes of attachment or execution against their owners. Shares of stock represent aliquot parts of the corporate property in a certain sense, but this is as to the whole property, and not segregated parts that may happen to be in a particular place or under the particular dominion of a given state; and these shares cannot be ascertained and distributed on a winding up until all the property, wherever situate, has been gathered together for such a distribution in *solido*, and not as to each separate part. Therefore, theoretically as well as practically, the location of never so much of the corporate property in a state where it is not incorporated or organized, but is only doing business by permission, does not, as to that property so located, establish the shares or aliquot parts thereof in the state of that location. It is quite incapable of such treatment under any view of corporate existence or control.

It is not worth the while to become involved in any intricacies of consideration as to the situs of a debt. It is only in a very qualified and somewhat metaphysical sense that a corporation is a debtor to its shareholders for their shares. The shareholders are the owners of the corporation, not its creditors, in relation to this matter of seizing the shares as property. The corporate property is not subject to seizure as their property for many reasons; and to reach the individual interests of the shareholders for the purposes of taxation, descent and distribution, and attachment and execution, and other purposes to be imagined, peculiar methods are to be adopted, and the situs of the shares may shift according to these needs, respectively. For the purpose of compulsory action to reduce the shares of any individual owner to money by judicial seizure and sale, almost necessarily you must act both upon the shareholder and the company, either jointly or in consecutive relation, and it is not enough to answer this necessity, which is founded in our rules of jurisprudence for giving notice before execution, to seize only the company by process of garnishment. It would embarrass its business to require the company constantly to look after the individual ownership of its shareholders in its shares, and they really have no duty in respect of this, except, perhaps, at its corporate domicile, where its shares are dealt with by it and the law. Every consideration, it seems to me, of public policy and private justice to the parties concerned, requires

that the situs of shares of stock for seizure by attachment or execution at law shall be that of the corporate domicile, or, if there can be any other, then that of the domicile of the shareholder. If they cannot be attached or taken in execution at either of these places, there is no reason why they should be elsewhere; and, if special legislation be required to reach them when the shareholder resides in one state and the corporation in another, it may be provided, and doubtless has been in many states. If special provision to that end is to be made for the plaintiff in Ohio because he is a citizen of Ohio entitled to its aid against nonresidents having property in the state, or any interest in property in the state, that likewise may be accomplished by appropriate legislation designed for the purpose,—such as affixing as a condition for doing business in the state a requirement that shareholders, as to their ownership in the shares, shall submit to suit in Ohio. But that has not been done, in my judgment, by any necessary implication from existing legislation,—either that subjecting the company itself to suit here by its voluntary or compulsory agreement to be served with process here, as a condition precedent, or by that prescribing a remedy by attachment against nonresidents, nor by both these together. There is no indication in the attachment laws of any distinction between a home creditor and a nonresident creditor as to their benefit, and therefore there is nothing in the fact that the plaintiff is an Ohio creditor which aids the implication under consideration. Nor does the fact that there may be a necessary implication from that agreement of effectual garnishment as to other property, like tangible personalty, or debts owing by the corporation to the nonresidents, aid that which we are asked to make as to the shares of stock.

Garnishment, at law, as to shares of stock, is not the same thing as garnishment of a debt owing by the company, or of property held by it in hand; and equitable attachment by garnishment, or analogous procedure, to that end, would, in the ordinary nature of equitable proceedings, require personal service on all the parties in interest, or such substituted service that it would not be appropriate where the principal defendant and the equitable garnishee were both out of the jurisdiction. Elsewhere than in the home state of the owner or the corporation, except in this qualified way that the garnishee corporation may be served with process, there could be no substituted process satisfactory to a court of equity, or a court of law proceeding with equitable remedies. Notice is essential in a court of equity to some one whom the court can control. That service is qualified by the fact that the shares of stock are not in the garnishee's hands or under its control elsewhere than in the state of its creation, because by the laws of that state alone the shares also are created; and, owing to that peculiar creation, they are regulated and governed nowhere else as to all their incidents, including that of alienation, by judicial process, as by other methods. The service is not qualified by any restrictive effect to reach only suits concerning its own business, for the company may be garnished generally, as to all people, in Ohio; but Ohio cannot, or at least has not undertaken by the attachment laws, to administer the laws of Michigan in relation to shares of stock in Michigan corporations. And the alienation of the shares as against the

shareholders, property of their own, as it is, and not of the corporation, by compulsory processes of any kind, is yet so intimately connected with the corporation administration that the alienation should be solely under the control of the laws of Michigan upon grounds of public policy, if nothing more. Whatever may be said of other forms of its corporate obligations, those to its shareholders must have their sole location in its own domicile (possibly as well in the domicile of the shareholder for some purposes), and they cannot, in the nature of the thing, follow the corporation into any place where it is liable to suit or process. To illustrate what is meant here, let us suppose that the laws of Michigan provided that shares of corporation stock should be exempt from attachment and execution, and could be subject to judicial alienation only by a bill in equity at the particular place where the company had its headquarters in Michigan. Could the shares be judicially alienated elsewhere on any theory that they had no situs, and followed either the shareholder or the company wherever either should go? Or, if the Michigan law required 30 days' advertisement before a judicial sale could operate to transfer the stock, and the Ohio law only 10 days, would the Ohio law override the Michigan law? Mr. Justice Story, in *Black v. Zacharie*, 3 How. 483, 511, holds that from the nature of stock of a corporation the validity of its assignment is necessarily, like every other attribute of a corporation, to be governed by the local law of that state, and not by the local law of any foreign state. In that suit the attachment of the stock was in the domicile of the corporation. It was also held, as to shares of stock, to be a principle of international jurisprudence that "personal property has no locality, and that the law of the owner's domicile is to govern the validity of the transfer or alienation, unless there is some positive or customary law of the country where it is found to the contrary." Page 514. This would imply that shares of stock are "found" in the place where the company is domiciled. And again I suggest that an attachment or garnishment in Ohio would not reach property held by the garnishee corporation in Michigan, albeit there may be service of process on the corporation in Ohio. There is no confusion here between the necessary manucaption by the sheriff of tangible things and the impossible manucaption of intangible choses in action, but only the suggestion that inherently shares of stock, unlike other choses in action, perhaps, require something more than mere notice to the obligor to effectuate their seizure. In *Gottfried v. Miller*, 104 U. S. 521, 528, it was held that an attachment of shares gave the attaching plaintiff no title to the company's property, and "did not in the least incumber it," or prevent its assignment by the company. Therefore the garnishment does not reach the company's property in Ohio, and the location of the property there does not affect the question.

It must be conceded that notice to the company's agent in Ohio that the defendant's shares had been attached would qua notice be as effectual if the Ohio agent did his duty as if lodged at the home office in Michigan. It would get there by a more roundabout route, that is all. And we know it has been as effectual here, for the garnishee defendant appears and sets up the defense for its shareholders just as

they set it up for themselves. But that is not the foundation of the public policy, or of the rule against the effectiveness of the garnishment. The objection of public policy is that, if shareholders are required to submit to foreign attachment on their individual liabilities in every state, far and near, to which the company goes to do business, they will be deterred; and the ground of judgment is that Ohio has not expressly imposed that burden by its statutes, and shares of stock in a foreign corporation are not, necessarily, to be imported into the statute by implication. Moreover, the nature of corporate shares is such that special legislation directing the procedure is required, so that there may be no inconvenient or disastrous conflict between the laws of Ohio and those of Michigan in the process of subjecting them to judicial sale and transfer to a purchaser. But if the Ohio laws governing judicial alienation were a copy of those of Michigan, it would not meet the difficulty. They would not be Michigan laws, which alone control. The absence of such special legislation is, however, against the idea that foreign shares were supposed to be included in the attachment or garnishment laws, or that the shareholders have had such a condition precedent imposed on them. The ordinary attachment laws did not reach choses in action, because incapable of manucaption by the sheriff, and they were supplemented by garnishment statutes designed to subject them; but, if there be a necessity or sound reason for it, the garnishment statute must likewise be held to fall short as to choses they cannot properly reach, and shares in a foreign corporation are of that nature, inherently. The line of reasoning in *Reimers v. Manufacturing Co.*, 17 C. C. A. 228, 70 Fed. 573, is, a fortiori, in support of the reasoning of this opinion, although the plaintiff here is a citizen of Ohio,—an immaterial circumstance, as I have already endeavored to show. That was the case of a debt owing by the corporation, and, as suggested here, stands on a different footing from foreign shares of stock which are not a debt, but something higher in grade and different in property incidents. So, the line of reasoning in *Mooney v. Manufacturing Co.*, 18 C. C. A. 421, 72 Fed. 32, somewhat in conflict with the last-cited case, is not against that here, because that, too, was the garnishment of a debt, and not foreign shares of stock.

The elaborate and very able opinion of Vice Chancellor Pitney in *Insurance Co. v. Chambers* (N. J. Ch.) 32 Atl. 663, is in full accord with the opinion here expressed as to the essential difference between the garnishment of a debt owing by a foreign corporation and its shares of stock. While disapproving very vigorously the ruling of the New York courts that debts owing by a corporation cannot be attached by garnishment served upon the agents of the company in a state where it has no corporate existence, and is only doing business, he approves with equal emphasis the holdings of those courts that the shares of stock cannot be so attached. *Plimpton v. Bigelow*, 93 N. Y. 592, 29 Hun. 362; *Straus v. Glycerine Co.*, 46 Hun. 216; *Id.*, 108 N. Y. 654, 15 N. E. 444; *Douglass v. Insurance Co.*, 138 N. Y. 209, 33 N. E. 938. And he remarks, in commenting on this point, that "stock in a corporation cannot be levied upon by an ordinary execution against the holder, except by special statutory provisions; and it would be most unjust

to hold a corporation liable as garnishee upon its stock when it cannot relieve itself from liability by delivering the stock over to the sheriff or other officer serving the writ." Shinn on Attachment (section 209, at page 406, and section 498, at page 868) cites, besides the above cases, a large number from other states to the effect that shares of stock are not leviable except by special statutory provision. Id. § 30, at page 49; Id. § 100, at page 156,—as to effect of the residence or nonresidence of the attaching plaintiff. Id. § 105, that the garnishee company is a foreign corporation notwithstanding its presence, doing business, in Ohio. Id. §§ 208, 209, at pages 402, 406, as to statutory methods of seizing shares of stock. Id. § 476, at page 485, that it is a fundamental requirement of attachment process that the indebtedness must exist or the property be within the state,—citing many cases,—so that on this principle it cannot be said that the garnishee company is indebted or holds the defendant's shares within the state of Ohio. Id. § 477, at page 485, that a mere custodian of a chose in action who is not indebted to the holder is not liable to garnishment. Id. §§ 489–498, as to character of persons who may be served as garnishee,—only those through whose control the thing may be subjected by judgment to the plaintiff's debt within the state (section 489). As to the situs of property subject to garnishment, section 490 is very instructive, it being shown that, according to many authorities, if the garnishee be a nonresident, and the thing he holds (or owes) is not within the state where the process is served (or the debt be not payable there), but is deliverable to the owner elsewhere, the service is not effectual to reach it; and the trustee of choses is not considered to carry them around wherever he may go or be found (at page 860). Id. § 491, is to same effect,—that where the principal debtor and the garnishee both reside out of the state, and the debt is payable not generally, but by its particular terms, elsewhere, the garnishment is ineffectual, because the thing to be done is not within the power of the court to be compelled. Can these shares of stock be said to be distributable in Ohio, and are they not particularly payable only in Michigan? Id. §§ 492–498, as to corporations as garnishees, domestic and foreign, showing that, while the general rule is that a foreign corporation which is amenable to process in another state may be subjected to garnishment there for anything it holds within the state, or for any debt it owes generally to the principal debtor, and not specially in another place, it cannot, without special legislation to that end, be reached by garnishment for the stock of a member.

It also must be conceded that after notice and publication in another state a judicial sale of the shares by the sheriff or other officer would be, in fashion and substance, just like a sale of the same kind in the home state of the corporation as against a nonresident member, for that is one way the purpose of appropriation may be accomplished, and, perhaps, a sufficiently effectual way of doing it; the purchaser at judicial sale being thus armed with the title to compel a transfer of the stock in the books. But, again, that does not meet the objection of want of dominion over the thing appropriated; not any more than if the state of Ohio should do the same thing as to tangible property or even land of the nonresident debtor situated in another state;

thereby, through substituted service, seeking to appropriate that which is in another state to the payment of debts due its own citizens or others resorting preferably to its courts. Indeed, in my view, shares of stock more nearly resemble land than movables in the quality of being fixed within the boundaries of the state which created them, and regulates all their qualities and incidents, as property. It is a question of resemblances and analogies, and is capable of no other treatment. The often-announced doctrine that the situs of shares follows the owner, like the situs of movables, wherever in fact they may be located, can only be said *sub modo* at most. Even as to land, by control of the person of the owner titles may be transferred away from their situs by judicial compulsion to execute the deed according to the law of the place where the land lies; but this hardly could be done by any plan of substituted service of process on the owner and notice to the tenant of the land. Whatever may be said in favor of the situs of shares following the owner for other purposes, for the purpose of judicial transfer the analogies swing back towards that of land, rather than movables. If the home state of the corporation may subject them as movables or as choses in action are subjected, and does this, it is sufficient to say that that state also has the same power to so subject lands, if it choose; and it does not follow that the underlying principle of the law of garnishment permits another state to do likewise with other corporate shares than those of its own creation. At all events, the statutes of Ohio have not in express terms undertaken to subject by garnishment foreign shares, as the property of nonresidents, when the corporations happen to have agents within the state doing corporate business there, and amenable to process. One section regulates service of a summons on corporations, and another applies this to foreign corporations having "a managing agent in the state." Rev. St. §§ 5044, 5046. In any civil action the plaintiff may have attachment against the property of the defendant,—of course, within the state is here implied,—when the defendant is a nonresident. *Id.* § 5521. This attachment commands the sheriff to attach the lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, money, and effects of the defendant "in his county." *Id.* § 5524. The sheriff is directed how to execute the writ as to real property and movables, including an appraisalment, and on bond may leave the thing seized with the garnishee. *Id.* §§ 5528, 5529. If the officer cannot get possession of the property, he leaves a notice with the garnishee to appear in court and answer. *Id.* § 5530. If the garnishee be a corporation, service may be had on the principal officer or managing agent, clearly including a foreign corporation. *Id.* § 5534; *Railroad Co. v. Peoples*, 31 Ohio St. 537. But none of these statutes direct that return of its shares shall be made by a foreign corporation so served except by whatever implication may be made upon the terms of this section authorizing service on the managing agent, and a section following, which declares that the garnishee shall make disclosure, "and in case of a corporation, of any stock held therein for the benefit of the defendant," taken also in connection with the leading section, *supra*, that stocks or interest in stocks may be attached. The statutes seem to make no distinction between domestic and for-

eign corporations, and there is none so far as relates to property held by either within the dominion of the state. But the distinction inheres as to property not held by the corporation within the dominion of the state in the nature of that fact itself, and appears when the answer is made and discloses that fact, if it does; or it would appear on proceedings against the corporation if it withheld the disclosure of the shares, and were proceeded against for an insufficient answer. Then the question would arise whether the shares were in fact within the state; but surely the fact that it does disclose them does not make them any more within the state than if the disclosure were not made, and the fact concealed, particularly if, as here, the liability were denied. These statutes must be read in the light of the fact that the legislation pertains to things in Ohio, and not things in other states, and, as to foreign corporations, that they may hold things not within this state, as may other garnishees (Shinn, *Attachm.* § 490), notwithstanding the broad language that corporations must disclose the shares held by the principal debtor. The statutes, in any event, do not undertake to enact that foreign shares held by a nonresident may be laid hold of in Ohio, except by construction and implication upon very broad language, making, in terms, no discrimination as to shares of stock and that kind of property the company might actually hold within Ohio; because, probably, the legislature knew that the language could not be extended to include things over which it had no power, or if it had any, required especial legislation for its exercise, so as not to intrench upon the inherent qualities affixed to shares of stock in the state of their creation. International comity would forbid this, if the power existed. Thus, while the legislature requires garnishee corporations to return their shares for judicial sale, that does not necessarily mean that the shares of foreign corporations may be judicially sold in Ohio, or that, if the owner does not reside here, they may be sold in spite of that fact. The language of all legislation is supposed to be restricted by considerations of international and interstate comity. The authorities indicate that the method of subjecting foreign shares to attachment would be by imposing that liability as a condition precedent to doing business in the state; and that not only the corporation, but the shareholders individually, should also submit to suit here. The absence of such a condition, expressly made or by implication arising from the scope of the statutory scheme, as it does in the case of the corporation itself, is a controlling circumstance to restrict the broad language of these attachment and garnishment statutes. Other provisions of the statute disposing of the property are significant as to its construction on this point. The property seized may be sold for preservation, put in the hands of a receiver, left with the garnishee on bond, etc.; but always he may discharge himself by paying the debt or delivering the property over to the officer. And how could a Michigan corporation deliver shareholder's stock to an officer in Ohio? It might transfer on the books to a Michigan sheriff, perhaps; but could it do this, properly, to a foreign sheriff, at the order of a foreign statute or a foreign court? Or, rather, would Michigan, by comity or constitutional obligation, be compelled to recognize and give effect to these foreign laws and or-

ders made in other states? If not, the property is scarcely to be held to be within Ohio for that purpose. Rev. St. Ohio, §§ 5539-5553. Again, after judgment for the plaintiff the property is to be sold, and by another section paid-up shares are declared to be personal property, and may be sold on execution. Rev. St. Ohio, § 5555 et seq.; Id. § 3255. Suppose the laws of Michigan should declare that shares held in a railroad company should be deemed real estate,—as they might,—or that they should not be liable to execution at all; how could the laws of Ohio operate to change all that by the mere form of garnishment and sale of the shares? The difficulties are inextricable, and, while the cases have not been examined in other directions for analogies or results, and confining our consideration to these particular statutes and to these facts, I do not doubt that this garnishment has not in the least incumbered the shares with any lien, or so put them in custodia legis that it can be made the basis of any publication, process, or judgment here against the nonresident defendants.

The case of *Miller v. U. S.*, 11 Wall. 268, 294, abundantly illustrates the difficulties of seizing stocks by mesne or final process elsewhere than in the home state of the corporation by showing the difficulty of doing it there, as pointed out by the opinions and dissenting opinions, which are very instructive on this subject of seizing shares of stock by judicial process. That, too, was a case of Michigan stocks, and it appears they are not to be attached in that state by mesne process, unless the law has been changed since that time. It was done in that case by garnishment notice at the home office perforce of an act of congress acting within the state of Michigan. What was said by the Sixth circuit court of appeals, through Mr. Circuit Judge Taft, in speaking of a statute of Michigan which said that "any corporation, domestic or foreign, may be garnished under this act" (*How. Ann. St. Mich.* § 8086), well applies here:

"At all events, there is nothing in the garnishee statute of Michigan expressly requiring a foreign corporation to submit to a judgment in garnishment in such a case. And the mere provision that such corporation shall be generally subject to garnishment is not to be interpreted as imposing a liability, power to impose which is rendered doubtful by the considerations already stated." *Reimers v. Manufacturing Co.*, 17 C. C. A. 230, 70 Fed., at page 575.

We are told by counsel that the precise question has not been decided by the Ohio courts. Counsel disagree as to whether debts due by nonresident garnishees can be attached in Ohio by service when the garnishee is found in Ohio; but it may be conceded that they may when the garnishee has a business residence here, and yet it does not appear that shares of stock also may be seized, since they stand on a different footing from debts. The case of *National Bank of New London v. Lake Shore & M. S. Ry. Co.*, 21 Ohio St. 221, was the seizure of shares in an Ohio corporation, and establishes that, where the nonresident debtor owns such shares, they may be subjected by garnishment under the above statutes. So, in *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348, as to the shares of an absconding debtor in an Ohio corporation; but this is only an affirmance of the doctrine of *Miller v. U. S.*, 11 Wall. 268, that garnishment notice is an appropriate way

to seize shares of stock in the home office of the corporation, and they go no further than that. It is said in *Norton v. Norton*, supra, that "at common law stock in corporations was not subject to levy or attachment. The shares of stock were neither a chattel or a chose in action." And that the Ohio statutes seize the shareholder's equitable interest in the corporation. 43 Ohio St. 521, 522, 3 N. E. 351. Can the Ohio statutes have the effect to thus change the common law in Michigan? In *Railroad Co. v. May*, 25 Ohio St. 347, sanction is given to the validity of garnishment in West Virginia of a debt due by the railroad company to a citizen of Ohio at the suit of his creditor, also a citizen of Ohio. The railroad company was a corporation of West Virginia, presumably, though the fact does not distinctly appear. In *Railroad Co. v. Peoples*, 31 Ohio St. 537, it is said that for all purposes of proceedings under the attachment and garnishment laws a foreign corporation operating a railroad in Ohio under the statutes in that behalf is to be held a domestic corporation; but this was said upon a showing that the garnishee foreign company had here in Ohio, in its possession, cars and like tangible property belonging to the principal debtor, also a foreign company. The case did not concern shares of stock at all. In *Root v. Davis*, 51 Ohio St. 29, 36, 36 N. E. 669, there are expressions of the opinion which favor the doctrine about which there is so much conflict, that "the credits of a nonresident debtor, without personal service upon him, cannot be attached in this state by simply serving the process of garnishment upon his debtor residing within the jurisdiction of the court issuing the process. That would be, as claimed, to give the laws of the state an extraterritorial effect." And some doubt of the soundness of the case of *Railroad Co. v. May*, supra, is expressed. But this was said only arguendo, does not appear in the official syllabus, and was held not to apply as between citizens of the state in relation to their residence in different counties.

The case of *Winslow v. Fletcher*, 53 Conn. 390, 4 Atl. 250, cited by plaintiff, is in favor of the ruling here made, though in that case neither of the parties was a resident of Connecticut, except the garnishee. But I have endeavored to show that the mere residence of the plaintiff does not increase the power of the state in the premises. It is the presence in the state of the defendant, or the thing he owns, which is the essential element of control, and not the presence of the plaintiff, where the state makes no discrimination, and allows all plaintiffs, whether resident or nonresident, equal access to its courts, as most states do, even for the purposes of appropriation by attachment of the property of a debtor found within the state. In that case a Massachusetts creditor sought to reach shares of stock in an Indiana bank belonging to his Indiana debtor, in the hands of a Connecticut garnishee, holding them as a pledge. It was held that he must go to Indiana, "where, in contemplation of law, the stock is situated. By coming here they can only succeed upon the theory that in some sense the stock is located in this state. Such a theory is inconsistent with a familiar and well-settled rule that stock in a corporation, for the purposes of an attachment, has its situs where the corporation is located." It is further said that the sale of stock in another state

by execution or process is not open to creditors in this state. The case is stronger, of course, for a plaintiff, where the company whose shareholders are attached is doing business, and has considerable of the corporate property, in the state issuing the process, and is liable generally to suit there. But the principle is the same in either case, for it is not the company which is sued, but another, who has never asked any permission to do business in the state on conditions agreed upon as precedent to the privilege, and who is, therefore, not *pro hac*, and for that purpose, a resident of the state, by agreement. He stands outside of all this, and, to my mind, is in no sense in a different category than the Indiana shareholder in the Connecticut case.

In *Miller v. Hooe*, 2 Cranch, C. C. 622, Fed. Cas. No. 9,573, a District of Columbia garnishee answered that he held property of the defendant debtor under his control at his mill in Virginia, just across the line; and the court held that it was not liable to the process.

In the case of *Pinney v. Nevills*, 86 Fed. 97, it was decided by the circuit court of Massachusetts, upon the authorities cited, that shares of stock in a foreign corporation are not subject to attachment under the statutes of Massachusetts. Mr. Circuit Judge Colt says: "The general rule of law is that shares of stock in a foreign corporation, owned by nonresidents, are not the subject of attachment."

I must confess that there is difficulty in dealing with the logical bearing of the fact that a large part of the corporate property is in Ohio, and that, if this corporation is amenable to suit in Ohio by general process, which is notice to it for all purposes of process, and may be garnished as to things in its hands and under its control as domestic corporations may be, notice about its shares delivered in Ohio is quite as effectual *qua* notice as if delivered in Michigan, for the excitation of its own action in the premises; that, after such notice, it may do practically, as to those shares, either by way of notice to its shareholder or by way of its dealing with them, anything it might do if the same notice were lodged across the line, and that there is a good deal of barren technicality about the situs of such property, and its shifting from one place, to another, as may be convenient for the uses that may happen to be wanted for a situs for it. Yet I am convinced that the soundest principles of public policy, private justice, and international or interstate comity and obligation require that shares of stock shall be subjected, *in invitum*, as against an owner not served with process personally, only in the state which created the stock, and regulates its incidents by its own laws, and has the sole right to declare how and under what circumstances it shall be liable to judicial process operating alone upon the stock, and not upon the owner. If I am wrong about this ruling, and it puts unauthorized restrictions upon the statutes of Ohio, it is satisfactory to know that a *mandamus* will compel this court to take the jurisdiction. Motion granted.

WINTERS v. COWEN et al.

(Circuit Court, N. D. Ohio, W. D. October 10, 1898.)

No. 1,413.

1. CARRIERS OF PASSENGERS—SALE OF TICKETS—REPUDIATION OF CONTRACT.

A railroad company which authorizes another company to issue and sell mileage tickets good over its road makes the latter company its agent, and cannot repudiate the contract so made with a passenger who in good faith buys a ticket from such agent.

2. EXEMPLARY DAMAGES—INCLUDING EXPENSES OF LITIGATION.

Under the decisions of the Ohio courts, where punitive or exemplary damages are allowable, the jury may take into consideration the fair and reasonable expenses to which the plaintiff has been subjected in the vindication of his rights by litigation.

3. SAME—IMPLIED MALICE—EJECTION OF PASSENGER BY CARRIER.

Where the general passenger agent of defendant railroad company deliberately repudiated a large number of mileage tickets which had been issued and sold to the public by his authority, and, in consequence of his orders, plaintiff, who had purchased one of such tickets in good faith, was ejected from a train, such a reckless disregard of the duties of the defendant and the rights of its ticket holders, by one of its controlling officers, constituted implied malice, and warranted the imposition of exemplary damages.

On Motion for New Trial.

Motter & McKenzie and James M. Brown, for plaintiff.

J. H. Collins, for defendants.

HAMMOND, J. Briefly, the facts are that the defendants and the Cincinnati, Jackson & Mackinaw Company had an interchangeable mileage book arrangement, and, by a ticket agent at Cincinnati, sold one of the books to the plaintiff. It was repudiated by the defendants, and the plaintiff was ejected from their train without violence, indignity, or other injury than that resulting from the inconvenience and delay incident to the occasion, as it appears in the proof. The Mackinaw Company had sent for sale in bulk at wholesale something over 600 of these books to the agent in Cincinnati. Instead of selling for cash, as he was expected to do, he trusted the broker, who did not pay, and, failing to recover them, the Mackinaw Company instructed all its conductors to outlaw every book presented within the designated numbers covering the 600 books. It also demanded of the defendants that they should reject, according to a list of the numbers, each of these 600 outlawed books; but the defendants, declining to take this burden, repudiated its contract by refusing to receive any book whatever issued by the Mackinaw Company, and so instructed their conductors. The plaintiff's book was not in the outlawed list, having been purchased before the trouble arose. The correspondence between the general passenger agents of these two companies, who were the officials responsible for this ejection of the plaintiff, shows how recklessly they disregarded the rights of the public holding their interchangeable mileage books, innocently, and without notice of any trouble in the premises. It was an entirely unjustifiable performance on their part to ignore the right of the plaintiff certainly, and others of the public who had bought books unaffected with the alleged in-

firmity. Even as to the 600 tickets, they were not stolen or embezzled or counterfeited; nor were they in any sense defective on their face or in their issue. By their own neglect the companies had put them on the market without receiving, as they expected, cash for them; and the proposition was to impose this loss on the public, or, at least, to mitigate it by putting all holders to the trouble of an investigation, delay, and expense of attention to the matter of securing a refunding of their money, which comparatively few would incur perhaps. These superior officials did not seem to care for the loss, inconvenience, or injury resulting from the rejection of their tickets to passengers; nor for the human indignation they would feel at being put off a train while holding a good ticket, or else being forced to pay fares unlawfully demanded, with only a suggestion to carry their complaints to a distant headquarters, and show that they had a good claim against the company,—to prove that they were innocent of the offense of buying a ticket which the company had itself placed on the market, but which, through the mismanagement of its own agents, had been sold to brokers on a credit that had failed. And on the witness stand neither of them seemed to regret the predicament of the plaintiff, or to recognize that he had the least ground of complaint on any score. The purchase money of his ticket was not tendered, even by the pleadings here, or otherwise. My purpose in charging the jury was to restrain their natural sense of the outrage of this transaction, and to confine their verdict within temperate limits. It is rather larger than I would have given if on the jury, or if the case had been tried without a jury, for the reason that the conductor's treatment of the plaintiff was so very gentlemanly, and he discharged the disagreeable duty imposed by his superiors with so much regard for the plaintiff's situation that there is no just cause for complaint of his conduct on that occasion.

There was an incident occurring at the trial which possibly inflamed the jury somewhat, though everything was done by the court to prevent that mishap, it being quite apparent that the defendants here sued were not responsible for it, nor their counsel. Shindler, the Mackinaw Company's passenger agent at that time, and who was largely, if not entirely, responsible for the reckless disregard of the rights of the plaintiff in the premises, by assuming, as he did, that he might reject perfectly good tickets sold to unsuspecting purchasers, and forcing the defendants, by his unreasonable demands, to assume that they might lawfully reject all tickets, good or bad, because it was burdensome to them to distinguish good from bad, was called as a witness for the plaintiff. He demanded of the plaintiff in open court, before the jury, that his fees and mileage should be paid before he would testify; and, this being ruled in his favor, they were paid. When it was developed in the testimony that he was largely responsible for the trouble, there was an evident dissatisfaction at his ill-natured demand for his fees in advance; but the court, by admonition and restraint of counsel, protected the defendants against any undue influence of the incident. So, take it altogether, there is no reason for setting aside the verdict for \$1,000, because it is too large.

The main ground urged for a new trial is the contention that the de-

fendants were not perpetually bound by their contract for interchangeable mileage tickets, and might revoke it, leaving the purchasers from the Mackinaw Company to look to them to refund the purchase money. The answer to this is that the plaintiff purchased his book before this trouble arose, and it was already a contract with defendants. But, beyond this, these tickets were pro hac the defendant's own tickets, and the issuing company's agents were its own agents for their sale. They should have been withdrawn from use with due regard to the rights of holders, or from the hands of agents, and not exposed to sale; for surely the traveler who goes to an authorized agent having the tickets on hand, and offering them for sale, cannot be required to investigate the traffic contracts to see if they do in fact authorize their sale. Once they are authorized and put upon the market, an innocent purchaser, without knowledge of the revocation of authority, would be protected in their purchase, by enforcing the contract of carriage in his favor. This is the familiar law of agency and the law of sale of such paper as railroad tickets. *Railroad Co. v. Winter*, 143 U. S. 60, 69, 12 Sup. Ct. 356.

The concern I have had about the instructions to the jury relate to the matter of exemplary damages. The distinction taken between punitive and exemplary damages may not be technically correct, but it was designed to eliminate from the minds of the jurors any disposition to punish the defendants, and yet to permit them to enlarge their verdict, if they saw fit, by allowing exemplary damages to the extent of reasonable compensation for necessary expenses of vindication by litigation not strictly falling within the bill of costs, such as a reasonable compensation to attorneys. The jury was told that:

"The plaintiff has a right to recover whatever reasonable and temperate sum of money will compensate him for his actual losses as they appear in the proof, to which you may rightly add such sum as, in your judgment, will protect the public against wrongful acts of like character by common carriers,—by way of example, not by way of punishment, for I wish to insist upon a distinction between the two, whether it be a technical distinction or not. It is a practical distinction, which we should bear in mind so as not to be misled by the bare use of words. Every common carrier owes the public a duty in this respect, somewhat different from other parties to a contract; and it is for the vindication of that public duty that the law permits jurors to go beyond mere compensatory damages, and allow exemplary damages, where there has been nothing but erroneous judgment, and yet a reckless disregard of the duty of a public carrier to comply with its contract of carriage and recognize the tickets it issues which are binding upon it; and sometimes the law permits jurors, where there has been actual insult and personal injury, degradation, and humiliation, to add smart money or punitive damages."

There was an application of this to the facts of the case, and it was further explained that, in this principle of giving exemplary damages, reasonable allowance might be made by the jury, if they thought the case was one for exemplary damages, for incidental expenses and attorney's fees that could not be recovered if there were only a case for compensatory damages and nothing more. It might not be lawful to take proof of the lawyer's fees and expenses to be allowed as such, by way of compensation; but, if the jury determined to give exemplary damages on the facts, they could consider that the plaintiff had been

at such expense necessarily, and fix the amount so as to cover such fair and reasonable estimate as they might make. This is the substance of the instructions, and, on the authority of the Ohio cases, I am disposed to adhere to them as correct. *Roberts v. Mason*, 10 Ohio St. 278; *Railroad Co. v. Ensign*, 10 Ohio Cir. Ct. R. 21; *Railway Co. v. Ensign*, 56 Ohio St. 760, 49 N. E. 1115. That was a strong case for punitive damages, in an action for assault and battery; but, if the case be one for only exemplary damages,—if there be a distinction,—I am not able to see why the same principle does not apply. Modern cases have somewhat mitigated the law against carriers in this matter of exemplary damages, by excluding from its allowance those cases where the agent of the carrier was acting outside the scope of his duty, and the malice, express or implied, was that of the agent, and not the principal. Or, to state it otherwise, that breach of public duty, which is so flagrant in its character that it demonstrates that there has been a reckless disregard of the right of the public in the particular case of the passenger who is wrongfully ejected, must be, in the given case, a breach by the carrier company itself, in the sense that the wrongful act constituting the breach was an authorized act, and not the mere individual act of the agent, done beyond the scope of his authority. Such a reckless disregard is implied malice, or is the equivalent of malice, in a technical or legal sense, for which the law allows exemplary damages, as well as for actual malice or ill will; but it must be in its implication attributable to the carrier, and not to the particular employé on his individual account, unless it may be that the recklessness is founded in the act of the carrier in selecting an incompetent employé or agent; and, where there is no blame in the selection of the agent, the test is that of his authority,—the scope of his authority.

In my judgment, this case falls rather within the category of the case of *Railroad Co. v. Harris*, 122 U. S. 597, 609, 7 Sup. Ct. 1286, than that of *Railway Co. v. Prentice*, 147 U. S. 101, 110, et seq., 13 Sup. Ct. 261. It is true, there was no physical violence in this case, and the recovery of exemplary damages here in no sense depends upon the treatment of the plaintiff by the conductor, and it is not at all like the last-cited case. Nor was there any such flagrant criminality as was found in the other case just cited, by the "controlling officers," to use the language of the opinion, who wantonly disturbed the peace of the community. But this is only a difference in degree. The disregard of the plaintiff's right was, in the nature of that right and its relation to this subject of exemplary damages, just as flagrantly wrongful in the one case as the other, and the principle of making an example for the benefit of others is equally applicable. It is not the character or extent of the injury that invokes the principle, and these cited cases all say that the exemplary damages are not given in behalf of the plaintiff, nor to soothe his injuries, but in behalf of the public, which has been wronged, the public right being vindicated through the plaintiff. This principle is especially applicable to common carriers, and to enforce the rights of those who must resort to them for that service. Therefore, we do not, as in the cases of trespassers upon persons or property producing physical injuries by violence, rely

altogether upon that character of injury to determine the right of the public, through the jury, to impose exemplary damages. Those considerations may enter into the amount of the damages, but the right to inflict them depends upon the purpose to compel attention to a public duty. Mr. Justice Gray, in the *Prentice Case*, supra, cites and approves a case from Rhode Island where, on the facts of that case, exemplary damages were refused; but the approved principle of law quoted from that case fully covers this, and justifies the instructions given to the jury. *Hagan v. Railroad Co.*, 3 R. I. 88. The use of the word "criminality" in these opinions must not be misunderstood as meaning offenses under the criminal law, but only such indifference of others' rights as amounts to criminal or censurable negligence.

After referring to cases of aggravated misconduct or lawless acts, and saying that "the discretion of the jury in such cases is not controlled by any very definite rules," Mr. Justice Field, in *Railroad Co. v. Humes*, 115 U. S. 512, 519, 6 Sup. Ct. 110, 113, uses this language:

"For injuries resulting from a neglect of duties, in the discharge of which the public is interested, juries are also permitted to assess exemplary damages. These may perhaps be considered as falling under the head of cases of gross negligence, for any neglect of duties imposed for the protection of life or property is culpable, and deserves punishment."

See, also, *Scott v. Donald*, 165 U. S. 58, 86-89, 17 Sup. Ct. 266; *Milwaukee v. Arms*, 91 U. S. 489, 495, where Mr. Justice Davis states the rule thus:

"To do this, there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences."

It will is not necessary to constitute malice in law. It is enough if the act be wrongful, done intentionally, without just cause or excuse. *Bromage v. Prosser*, 4 Barn. & C. 247, 255.

In this case the "controlling officers" of the two companies, charged with the entire duty of regulating the passenger traffic and the management of this business between themselves and the public, after entering into a contract for interchangeable mileage tickets, putting them upon the market, and selling one of them to the plaintiff, without the least justification in fact or law, repudiated their contract with him; and this, under circumstances showing the most entire want of care in the premises. This, certainly, does raise a conclusive presumption of a conscious indifference to consequences. They consulted no counsel in a grave matter of legal liability, and, upon their own assumptions of law, acted recklessly and wholly in disregard of the rights of all ticket holders similarly situated as the plaintiff was. Without manifesting the least regret for the injury to the plaintiff, they showed on the witness stand a confidence in their own knowledge of the legal liability and duty imposed by the circumstances under which they acted, that demonstrated the conceit of their own infallibility. It well accounts for their selfish attention to their own profit, convenience, and comfort in the matter of dealing with the tickets they had put out and wished to recall, and at the same time their reckless and wanton inattention and care for the rights of the public. Motion overruled.

CONSOLIDATED FASTENER CO. v. WEISNER et al.**SAME v. LEHR.**

(Circuit Court, D. Massachusetts. October 31, 1898.)

Nos. 961 and 962.

PATENTS—INFRINGEMENT—IMPROVEMENT IN METAL BUTTONS.

The Mead patent, No. 325,430, for an improvement in buttons, and relating particularly to buttons secured to the fabric by metal fastenings, the essential feature of the invention being an anvil plate in the interior of the button, against which the eyelet which passes through the fabric is riveted down upon the lower plate of the button, is not infringed by a button which has no such anvil plate.

These were two suits in equity by the Consolidated Fastener Company against Annie Weisner and others and against Samuel Lehr, respectively, for the infringement of a patent. Heard on motions for a preliminary injunction.

John R. Bennett and W. B. H. Dowse, for complainant.

Edmond Wetmore and William A. Jenner, for defendants.

COLT, Circuit Judge. This is a motion for a preliminary injunction, brought upon a bill for the alleged infringement of letters patent No. 325,430, granted September 1, 1885, to Albert G. Mead, for improvements in buttons. In *Kent v. Simons*, 39 Fed. 606, this court said, with respect to the Mead patent: "The Mead improvement is manifestly of limited scope, in view of the many prior devices." The Mead invention relates particularly to buttons secured to the fabric by metallic fastenings, and provided with an open central bore, which adapts them for use especially with spring studs. The specification says: "In the particular button finish, so called, combined with the central bore, and in the general arrangement and disposition of the several parts with respect to each other, is embodied the subject of my invention." The several parts of the Mead device are an exterior cap, a lower disk centrally perforated, and which is slightly dished, an upper circular disk provided with a central bore with the metal "at or near the opening bent or burred, forming a short frustrum of a cone." This disk or anvil plate rests upon the lower disk with the burred portion downward. The patent also describes a filling made of any stiff material, such as leather, which is inserted in the head of the button to prevent injury to the upper metal cap. The fastening eyelet is the ordinary eyelet having an internal central bore sufficiently large to permit the truncated cone formed on the anvil plate to enter therein. In operation the anvil plate spreads, and rivets the top of the eyelet down upon the lower disk, and prevents its withdrawal through the central bore of the button. The patentee states that he terms the upper disk an anvil plate, "since it acts like an anvil upon which to rivet or clinch the upper part of the shank of the fastening eyelet." The defendants' button consists of an inclosing cap having a button finish, an interior plate, a flanged tubular plate, which is put through the fabric, and having an in-turned lip, an under outside plate, or washer upon which the tubular plate is upset, and an inside paper

washer. It has no eyelet and no anvil plate. The flanged plate does not act as an anvil plate to turn over the upper edge of an eyelet. Nor is the lower plate, or disk, of defendants' button the same or the equivalent of the lower disk of Mead. It is not inclosed by the cap; no eyelet is riveted down upon it; it is on the opposite side of the fabric. An anvil plate to rivet down the eyelet upon the lower disk is the essential feature in the Mead button, and this feature is not found in defendants' device.

The first claim of the Mead patent is as follows:

"(1) In a button provided with a central opening for receiving a spring stud, the combination of an inclosing cap, a perforated bottom disk, a second disk above the first, the button being attached as a whole to the fabric independent of said stud, substantially as set forth."

We do not find in defendants' button "the perforated bottom disk," and "a second disk (or anvil plate) above the first," which are the essential elements of this claim; and therefore we must hold that there is no infringement of this claim.

The only other claim involved in the present hearing is the third:

"(3) The combination of a plate having a central opening or bore, with a convex cap, E, inclosing and attached to said plate, and provided with a filling, F, also centrally perforated, substantially for purposes specified."

The experts differ as to whether the plate mentioned in this claim has reference to the upper or lower disk of the Mead button. But, upon either construction of the claim, there is no infringement, because defendants' button does not contain either of these disks. Bearing in mind the limited scope of the Mead patent in view of the prior art, and, for the purpose of this motion, assuming the patent to be valid, we do not think the complainant has made out a case of infringement which entitles it to a preliminary injunction. Motion denied.

RAYMOND v. LA COMPAGNIE GENERALE, ETC.

WUERTZ v. SAME.

(Circuit Court, S. D. New York. November 10, 1898.)

ADMIRALTY—SUITS TO RECOVER FOR DEATHS—SECURITY FOR COSTS.

In actions brought on behalf of the next of kin against a steamship company to recover for deaths resulting from the sinking of a vessel which was a total loss,—defendant being therefore relieved from all liability for faults of navigation,—plaintiffs will be required to give security for costs, unless the inability of all the persons interested in the recovery to do so is shown.

Motion to Require Security for Costs.

Edward K. Jones, for the motion.

Kenneson, Craine & Alling, opposed.

LACOMBE, Circuit Judge. In view of the large number of these causes which seem to be pending in this court, the subject of requiring security for costs has been again considered. There is force in the contention of defendant that inasmuch as the statutory limitation of

liability (the steamer being a total loss) relieves it from all liability for faults of navigation, etc., the plaintiff's case is more than ordinarily speculative. Undoubtedly, the taking of testimony in support of and in opposition to the averments in the complaint will be an expensive matter; and the court is not unmindful of the fact that those averments are really not sworn to by any one, the usual verification being on information and belief. Nevertheless, individuals who may have a right to recover damages for the death of next of kin should not be deprived of their day in court, to show, if they can, that defendant's actionable negligence caused such death, merely because they are too poor to file security. On the other hand, the defendant should not be harassed by repeated trials of the same question, nor put to unusual and extraordinary expense in defending suits, the prosecution of which is left free to its adversaries. The following disposition of these and similar motions will be made: Where the affidavits clearly show that the persons interested in the recovery (i. e. the widow or next of kin) are all in such a condition pecuniarily that none of them is able to give security, the motion will be denied; otherwise it will be granted. The denials, however, are to be without prejudice to a renewal of the motion in the event of defendant prevailing on the trial of the first cause. If security be then exacted, defendant will thereafter be harassed only by litigants who deal with it on equal terms.

It remains only to dispose of the motions in the two causes above entitled. In the Wuertz case there is no sufficient proof of inability to furnish security. There is only the affidavit of the mother. Apparently, Eugene, Otto W., and George are of age, but none of them have sworn to their inability to give security. They should do so, and by affidavits which set forth facts, and not mere conclusions. In the Raymond case the affidavit is not sufficiently full as to plaintiff's pecuniary condition, and there is no affidavit presented by the sister of deceased showing her inability to furnish security. Plaintiffs may have 10 days in which to supply defects in proofs, if they can.

THE BELVIDERE.

(District Court, S. D. Alabama. October 25, 1898.)

No. 831.

1. SEAMEN—ABANDONMENT OF SHIP—SHORTAGE OF SUPPLIES.

The fact that the master of a vessel did not furnish his crew with the full supply of lime juice required by the law and the shipping articles, in the absence of any claim that the men suffered or were made sick by reason of such deprivation, and where no complaint was made on that ground, does not authorize the crew to abandon the ship before the end of her voyage, and recover their wages, nor entitle them to extra wages.

2. ADMIRALTY—ENFORCING LAW OF FOREIGN COUNTRY—SEAMEN ON FOREIGN SHIP.

In exercising jurisdiction in admiralty upon a libel for wages against a foreign vessel, the court will, through comity, administer the law of the country whose flag the vessel carries, to which law the seamen, by shipping for service on such vessel, subject themselves.

This is a libel by Fred Choate and others against the British bark Belvidere for the recovery of wages, and extra wages for short allowances.

Smith & Gaynor, for libelants.

Richard H. Clark, for claimant.

TOULMIN, District Judge. The libel in this case is for the recovery of wages, and extra wages for short allowance of provisions and lime juice; and so far as the libelant Julius Koleszar is concerned, also for a discharge on the ground of sickness, and consequent inability to do duty. However, Koleszar's claim for a discharge is disposed of by the admission that he refused to go to the hospital on the permit obtained for him by the master, and that he has shipped and sailed from this port on another vessel.

The specific averments of the libel are that on the day next after the vessel sailed from Rio Janeiro for Mobile, to wit, on June 10, 1898, when the allowance of provisions was given out, pork, butter, and lime juice were missing, and that this occurred without exception until the 14th day of July, 1898, when the libelants were served with seven days' allowance of lime juice, and afterwards with four more days of lime juice, but that no pork or butter was served, although, it is averred, the scale of provisions for the ship's crew required each of the crew to receive three-fourths of a pound of pork a day, one pound of butter a week, and three ounces of lime juice a day. The libelants also aver that they were put on short allowance of sugar on the voyage, and that the short allowance of these articles continued during the entire voyage. They aver that lime juice was served them but 11 days during the entire voyage, and that they received no pork or butter at all during the voyage, and very little sugar. How much sugar was received is not shown. They, however, state that they did receive vinegar a number of times as a substitute for lime juice, but this was received only a portion of the time. The libelants further aver in the libel that they complained of said treatment during the voyage, to the master, but the master continued said short allowance of provisions and lime juice, regardless of their complaint, until they finally left the vessel to seek redress ashore in Mobile; that the master refused them their wages and discharge at this port, and also refused to pay them extra wages for short allowance of provisions and lime juice. They aver that they suffered great privations on the voyage from the loss of lime juice, that the master was negligent in not furnishing it, and that they are entitled to extra wages, in the nature of damages, for such negligence; and they demand the same, as well as their wages, and pray the court to decree the payment to them of their wages, and extra wages for the short allowance complained of.

The scale of provisions, as shown by the shipping articles in evidence, does not provide for the allowance and serving to the crew of any butter at all. It does not allow $\frac{3}{4}$ of a pound of pork a day, as is alleged, but does allow $1\frac{1}{4}$ pounds a day for three days in the week. It does not provide for the issuance of any specific quantity of lime

juice, as is claimed, but provides for the daily issue of lime juice and sugar, or other antiscorbutics, in any case required by the merchants' shipping act. That act provides that lime juice, with sugar, shall be served out daily, at the rate of one ounce a day, to each member of the crew, as soon as they have been at sea 10 days, and during the remainder of the voyage, except when in harbor, and there supplied with fresh vegetables. The shipping articles—the contract—authorize substitutes and equivalents, and the admission is that vinegar was served in place of lime juice a number of times; and the evidence shows that both sweet and Irish potatoes, which are not provided for in the scale of provisions, were frequently served; also, that molasses was served. The evidence wholly fails to show that the libelants suffered any privations—that is, that they were made sick, or have been in any wise damaged—by the failure of the master to daily serve out to them lime juice. The master has rendered himself amenable to the law for such failure, and is perhaps subject to a fine therefor; but how have libelants been hurt? Does the fact that they did not get the lime juice as often as the law required the master to serve it to them entitle them to abandon the vessel, and demand their wages and extra wages? I think not. If they had been damaged—had been made sick—by the master's negligence in the matter, they might sue and recover their damages. *The Rence*, 46 Fed. 805. And if, by the British law, they are entitled to extra wages for a short allowance of lime juice, they may recover them. But does the fact that they had a short allowance of lime juice justify them in leaving the vessel, and claiming their wages? I have found but one case where it has been held that a failure to furnish lime juice justified the seamen in leaving the vessel, and in that case there was an entire deprivation of lime juice. None was furnished, and there was no substitute or equivalent therefor, so far as the facts reported show; and it may be that the seamen suffered, or were made sick, by reason of such deprivation. It does not appear from the case, as reported, how this was. *The Karoo*, 49 Fed. 651. In the case of *The Rence*, supra, it was held that where no lime juice is served, and the crew is attacked with scurvy, the ship is liable for the damage the seamen sustain on account of the disease. And it has been held that a seaman's quitting a vessel before the termination of the voyage, in consequence of not being supplied with provisions, did not work a forfeiture of wages. The abandonment of the ship under such circumstances—that is, when the seaman is not supplied with provisions—does not work a forfeiture. *The Castilia*, 1 Hagg. Adm. 59. An absolute deprivation of provisions, or provisions really so bad that they are unfit for the seamen's support, would justify their leaving the ship. *Ulary v. The Washington*, Crabbe, 204, Fed. Cas. No. 14,323. But the proof does not make such a case. The shipping act provides for short or bad provisions, to be recoverable as wages; but it does not provide for or justify an abandonment of the vessel before the termination of the voyage. British Merc. Ship. Act, 199. And it provides that if it is shown to the satisfaction of the court that any provisions, the allowance of which has been reduced, could not be supplied in proper quantities,

and that proper, equivalent substitutes were supplied in lieu thereof, the court shall take these circumstances into consideration, and shall modify or refuse compensation as the justice of the case requires. The proof on the part of the libelants fails to satisfy me that there was any suffering on account of short allowance of provisions, and particularly because of the deprivation of the specific articles mentioned in the libel. No butter was provided for in the scale of provisions agreed on. The proof of the claimant shows that the libelants got pork nearly every day, in soup, or cooked with peas or beans, and this is not denied by libelants' testimony. They did not receive $1\frac{1}{4}$ pounds pork three days in the week, but they did not complain at not getting it in that quantity. There was no complaint of the quantity furnished, or of the manner of serving it. The proof wholly fails to show that the libelants ever made any complaint to the master of short allowance, or demanded more of him, or that he refused to furnish them a full and sufficient supply. One of the libelants on one occasion asked the master for some sugar, and his request was complied with,—not immediately, but within a reasonable time, under the circumstances of the case, as shown by the evidence. The proof does show that there was some complaint by libelants to the steward about the bread. The allowance was short for a few days, and then only in comparison with the quantity they had been receiving on the voyage; and they had potatoes and other things not provided for in the agreement. However, there is no complaint in the libel about a short allowance of bread, and no claim therefor. That there was a short allowance of lime juice is conceded; that is, an allowance short of that required by law to be supplied. The master did not comply with the law in furnishing lime juice. For his failure to so comply, the law imposes a penalty, but this penalty does not inure to the benefit of the crew; and no law has been brought to my attention, and I have found none, that provides that they shall recover any penalty, in the way of additional wages, for the master's omission in this respect. *The Rence*, supra; *Petersen v. J. F. Cunningham Co.*, 77 Fed. 211-216. The claims for the failure of the master to serve libelants with lime juice will therefore be disallowed and denied. If the libelants had, by the master's breach of duty in the premises, suffered any damage, they could sue and recover therefor. *The Rence*, supra; *The Karoo*, supra. But they make no such claim in their libel or evidence.

When jurisdiction is exercised in a case like this, the court will administer relief, by comity, in accordance with the law of the flag of the vessel. Whoever engages voluntarily to serve on board a foreign ship necessarily undertakes to be bound by the law of the country to which the ship belongs. In *re Ross*, 140 U. S. 453, 11 Sup. Ct. 897; *Wilson v. The John Ritson*, 35 Fed. 663. And it has been held that, where the British vice consul, on the facts shown by the shipping articles and the statements of the libelants, had refused to order payment to them of their wages, the district court of the United States will dismiss the libel. *The New City*, 47 Fed. 328. The case now before the court has been fully examined and considered by the British vice consul on the same testimony that is submitted to the

court, and he refused to order payment to libelants of the wages claimed, and he protests against the court now taking jurisdiction of the case. Under all the circumstances of the case shown by the libel and the testimony, the court is of opinion that the libel should be dismissed; and it is so ordered.

THE STRABO.

(District Court, E. D. New York. November 7, 1898.)

ADMIRALTY—JURISDICTION—PERSONAL INJURY.

Where the libelant, a workman on a vessel lying at a dock, attempted to leave the ship by means of a ladder, by reason of the master's negligence not secured properly to the ship's rail, whereupon the ladder fell, and the libelant was thrown to the dock, and injured, it is inferable that the master's breach of duty took effect upon the libelant while he was upon the ship; and, although his physical injury was completed by his fall upon the dock, a court of admiralty has jurisdiction.

This is a libel by John J. King against the steamship Strabo for personal injuries. Heard on exceptions raising the question of jurisdiction in admiralty.

William C. Beecher, for libelant.

Owen & Sturges, for claimant.

THOMAS, District Judge. The exceptions to the libel concede the following facts for the purpose of raising the question of the jurisdiction of this court: The libelant, employed in loading a ship lying at a dock, attempted to leave the ship by means of a ladder, by reason of the master's negligence not secured to the ship's rail, whereupon the ladder fell, and the libelant was thrown to the ground, and injured. From this statement is inferred (1) that the injured person was on the ship; (2) that the negligent omission, viz. to fasten the ladder to the ship, was suffered on the ship; (3) that the causal influence was brought to bear and took effect upon the libelant while he was on the ship; (4) that a physical injury was caused to the libelant by his fall, which was increased by his striking the dock.

Several classes of cases exist which have relevancy to the subject under consideration. The first class is where the primal cause arises on the ship, and is communicated to property on the land. Such are cases of fire, originating on the ship, and carried or spreading to the shore. *The Plymouth*, 3 Wall. 20; *In re Phoenix Ins. Co.*, 118 U. S. 610, 7 Sup. Ct. 25. In this class also fall the cases of missiles sent from the ship, and taking effect elsewhere. *U. S. v. Davis*, 2 Sumn. 482, Fed. Cas. No. 14,932; *The Epsilon*, 6 Ben. 378, Fed. Cas. No. 4,506. Also, cases are included where some part of the ship comes in contact with the land, to the injury of persons or property thereon (*Johnson v. Elevator Co.*, 119 U. S. 388, 7 Sup. Ct. 254; *The Maud Webster*, 8 Ben. 547, Fed. Cas. No. 9,302); and herein should be gathered instances where the vessel does

damage to wharves (*The C. Accame*, 20 Fed. 642; *Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique*, 63 Fed. 845, 848). Also, cases fall within this class where material discharged from a ship comes in contact with persons on land. *Anderson v. The Mary Garrett*, 63 Fed. 1009. See, also, *Price v. The Belle of the Coast*, 66 Fed. 62. In all cases arising under this first class, the injured person or thing is on land when the negligent act operates upon him or it, and a court of admiralty has no jurisdiction. Another class includes cases where the primal cause arises on land, and is injuriously communicated to the ship on the water. Herein are included structures wrongfully maintained, and interrupting navigation. *Atlee v. Packet Co.*, 21 Wall. 389; *The Maud Webster*, 8 Ben. 547, Fed. Cas. No. 9,302; *Greenwood v. Town of Westport*, 60 Fed. 560; *Oregon City Transp. Co. v. Columbia St. Bridge Co.*, 53 Fed. 549; *City of Boston v. Crowley*, 38 Fed. 202, 204; *The Arkansas*, 17 Fed. 383. And herein fall cases where material discharged from land into the ship does injury to persons on the ship. *Hermann v. Mill Co.*, 69 Fed. 646. In this class of cases, the ship, and hence a person or thing thereon, is on the water, and it has been considered that the court had jurisdiction. *The H. S. Pickands*, 42 Fed. 239, is different. There, a person descending from the ship by means of a ladder was thrown upon the wharf by reason of the previous negligent act of the master in removing the end of the ladder from the cleat that held it in place on the wharf, and it was adjudged that this court was without jurisdiction. In that instance the causative negligent omission was on land, but operated upon the libellant while he was on the ship, provided the ladder be deemed an incident or attachment of the ship. It differs from the cases under the first class in this: that a negligent condition initiated on shore was set in operation by the libellant attempting to leave the ship by the ladder.

It may be considered whether these decisions have been made pursuant to some rule of general application. All cases for ultimate authority refer to *The Plymouth*, 3 Wall. 20. There it was said:

"The wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. In other words, the cause of damages, in technical language, whatever else attended it, must have been there complete."

Again, "the whole, or at least the substantial cause of action, arising out of the wrong, must be complete within the locality upon which the jurisdiction depends,—on the high seas or navigable waters."

What construction has been placed upon these expressions in subsequent opinions? In *The Mary Stewart*, 10 Fed. 137, where the entire transaction was in fact on a wharf, it is said:

"There are two essential ingredients to a cause of action, viz. a wrong, and damage resulting from the wrong. Both must concur. To constitute a maritime cause of action, therefore, not only the wrong must originate on water, but the damage—the other necessary ingredient—must also happen on water."

This holding was criticised in *City of Milwaukee v. The Curtis*, 37 Fed. 705, where it is stated that:

"It suffices if the damage—the substantial cause of action arising out of the wrong—is complete upon navigable waters."

Also, in *Hermann v. Mill Co.*, 69 Fed. 646, the rule stated in *The Mary Stewart* is regarded as too broad, and the learned judge interprets the law as follows:

"I think that the only true and rational solution of the jurisdictional question, where the tort occurs partly on land and partly on water, is to ascertain the place of the consummation and substance of the injury. This latter element of the wrong is necessarily the only substantial cause of action; otherwise, it would be *damnum absque injuria*."

In *The H. S. Pickands*, *supra*, it was considered that, to confer jurisdiction on this court, the injury must have been consummated and the damage received upon the water, although the wrongful act may have been done on the ship.

In *The Maud Webster*, *supra*, the court said:

"In a case of tort, there can be no jurisdiction in the admiralty unless the substantial cause of action, arising out of the wrong, was complete upon navigable waters."

In *Johnson v. Elevator Co.*, *supra*, it is held that this court has not jurisdiction of a tort when the substance and consummation of the wrong has taken place on land, and not on navigable water, "the cause of action not having been complete on such water."

It will be observed that more precise knowledge is derived from the nature of the cases than from the general language used. The cases usually involve a state of facts showing that the negligent act or omission arose in one locality, and was communicated to the libellant or to his property in another locality, and that the damage or actual physical injury always occurred in the locality where the wrongful act or omission took effect. But in *The H. S. Pickands*, *supra*, it appears that the negligent omission was on the dock, was communicated to the libellant on the ship, or at least on the ladder leading to the ship, and the chief physical injury resulted from his falling on the dock. While the cases wherein the jurisdiction has been contested usually show either the cause on the water, and the operation of the cause and all injury on land, or the cause on the land, and the operation of the cause and all injury on water, the language of the opinions is often broader. In *The Plymouth*, *The Maud Webster*, and *Johnson v. Elevator Co.*, the statement is that the substantial cause of action must be complete on navigable waters, or similar phraseology is used. In *City of Milwaukee v. The Curtis*, *Hermann v. Mill Co.*, and *The H. S. Pickands*, the locality of the completion of the damage or injury is emphasized as the test of the locality where the tort was committed. It does not seem that it was the intention in the latter cases to lay down the rule that the physical injury must be completed on the water to give courts of admiralty jurisdiction, irrespective of the locality where the breach of duty first operated upon the person injured. Such a rule would imply that the first direct effect of a breach of duty upon the injured person on the ship could not create a cause

of action if the injury were completed on land. Such a position should be tested.

If a ship carpenter were employed to mend a yard on a vessel lying at a dock, and, by the master's negligence, he were caused to fall, and he should fall upon the vessel or in the water, would this court have jurisdiction; but, if he should strike on the dock, would this court be without jurisdiction? If a passenger, standing at the gangway, for the purpose of alighting, were disturbed by some negligent act of the master, would the jurisdiction of this court depend upon the fact whether he fell on the deck, and remained there, or whether he was precipitated upon the dock in the first instance, or finally landed there after first falling on some part of the ship? If a seaman, by the master's neglect, should fall overboard, would this court entertain jurisdiction if the seaman fell in the water, and decline jurisdiction if he fell on the dock or other land? The inception of a cause of action is not usually defined by such a rule. It may be admitted that the act or omission which puts in force the primary hurtful agency does not constitute the cause of action; for, until such force takes effect injuriously upon the person or property of some one, there is a mere naked breach of duty, and the case is *damnum absque injuria*; but, where the breach of duty puts in motion agencies that come in actual injurious collision with the person or property of another to whom the duty was due, the cause of action at once arises, and the locality of the tort is fixed, however much the physical injury may be aggravated by subsequent occurrences, which may be regarded as continuations of the original wrongful act, and its immediate operation, and in a sense as incidents thereof.

The more consistent rule seems to be that a court of admiralty has jurisdiction when the negligent act or omission, wherever done or suffered, takes effect, and produces injury to the person or property of another, on navigable waters. In that case it would be unimportant where the breach of duty occurred, or where the physical injury was completed. Under such a rule the holdings against jurisdiction would be defensible in cases where articles hurled or discharged from a ship take effect and injure a person on shore, or where fire is communicated from the ship to the shore, or the ship itself comes in contact with persons or things on shore, or things unlawfully in the water interrupting navigation. And so as to holdings in favor of jurisdiction, where articles are cast or discharged from the land into the ship, thereby injuring it or persons or property thereon, or where the ship comes in contact, to its injury, with defective docks, or other things illegally interrupting navigation, or structure in or over the water in an unlawful condition. Such a rule would justify the decision in the cases cited, save, perhaps, that of *The H. S. Pickands*.

Let it be supposed that a man is on the deck of a vessel, and a cause arising on the shore—for instance, the moving boom of a derrick—strikes him, casting him to the land, where he receives added injury; would the admiralty be without jurisdiction? Suppose he is rigging a derrick on land, and, by a negligent act, is

cast on a ship lying at the dock or in the water, and receives additional injury; would this court have jurisdiction? It seems that both inquiries should be answered in the negative. So, in *The H. S. Pickands Case*, if it could be said that the injured man was on the ship, by being on the ship's ladder, and received any actionable injury thereon, this court would have jurisdiction, although the greater injury was received from contact with the dock. But the facts in that case are not sufficiently detailed to admit of accurate inquiry. It is said above that, in addition to the breach of duty, there must be an injurious effect from it upon the person or property of a person on the water, to give this court jurisdiction. What is injurious effect? If the libel showed that only injury entitling to nominal damages were received, it may be conceded that this court would not entertain jurisdiction; but it cannot be assumed that, when a person is thrown from a ladder, there would be nothing more of injury while falling than would be compensated by nominal damages.

In the present case it has been assumed that the libelant, while stepping on the ladder, was still on the ship; and, if that inference be correct, then he received the effect of the wrongful act on the ship. The libel alleges neglect in fastening the ladder to the ship, and therefore it may be inferred that the breach of duty arose on an appliance of the ship. The libelant was thrown from the ladder, and it cannot be assumed that, through nervous shock or otherwise, he received no injury until he struck the dock. But even so, the whole wrongful agency was put in motion and took effect on the ship, and thereby the libelant was hurled from his position on the ship, and, before he reached the dock, was subjected to conditions inevitably resulting in physical injury, wherever he finally struck. Therefore, may it not be concluded that a cause of action arose before the physical injury had been completed? This question does not require present decision, and is reserved, as it may be inferred that the libelant received some personal injury before striking the dock, although, upon striking, his injury was enhanced. It is intended to be decided at this time that if the libelant received any physical injury before striking the dock, although the sum of his injuries was not complete until he did reach the dock, this court has jurisdiction. In reaching this conclusion the court has been limited by the meager statement of facts in the libel. Upon the hearing of the merits, the facts may receive such modification or change as to demand, by the force of previous authority, a different holding. The exceptions should be overruled.

THE HENRY B. HYDE.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1898.)

No. 431.

SHIPPING — LIBEL FOR INJURY TO GOODS — EXCEPTION IN BILL OF LADING — BURDEN OF PROOF.

Where a libel for injury to goods in shipment alleges that the injury consisted of breakage, the case is *prima facie* within an exception in the

bill of lading against liability for loss or injury from breakage, and the burden rests on the libelant to prove that the breakage occurred through the negligence of the carrier. 82 Fed. 681, affirmed.

Appeal from the District Court of the United States for the Northern District of California.

This was a libel by W. W. Montague & Co. against the ship Henry B. Hyde and its owners, Benjamin F. Pendleton and others, to recover for breakage of goods in shipment. From a decree dismissing the libel, the libelants appeal.

Linforth & Whitaker, for appellants.

Andros & Frank, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The appellants filed a libel against the ship Henry B. Hyde, whereof the appellees were the owners, to recover damages claimed to have been sustained by the libelants by reason of the breakage of certain goods which they had shipped by said vessel at the port of New York in December, 1892, for delivery at the port of San Francisco. It was admitted that the goods were received upon the ship in good order and condition, and that they were damaged while on the voyage. No evidence was introduced by either the libelants or the owners to show from what cause the breakage occurred. The bills of lading which the ship issued for the goods when it received them at New York contained the stipulation, "Not accountable for leakage, rust, or breakage." It was held by the district court that, by virtue of these words in the bills of lading, the carrier was *prima facie* not liable for the breakage, and that the burden was upon the libelants to show that the damage resulted from the carrier's negligence. This ruling is now assigned as error.

There is no controversy between the parties as to the effect of the stipulation limiting the liability of the carrier. It is conceded that the carrier may limit its liability by such a contract with the shipper, but that, notwithstanding such limitation of liability, the ship shall still be answerable for the negligence of its officers and employes. There is only one question, therefore, before the court, and that is, upon which party rests the burden of proof to show whether or not there was negligence? The rule seems to be well settled by the authorities that, in determining whether or not an injury to goods is of such a character as to come within an exception of liability which is provided for in the bill of lading, the burden of proof is cast upon the carrier; but that after it is once determined that the injury is of a nature, or has occurred from a cause, for which liability is excepted, it devolves upon him who claims damages to show that the loss occurred through the carrier's negligence. *The Delhi*, 4 Ben. 345, Fed. Cas. No. 3,770; *Vaughan v. 630 Casks of Sherry Wine*, 7 Ben. 507, Fed. Cas. No. 16,900; *Wolff v. The Vaderland*, 18 Fed. 733; *The New Orleans*, 26 Fed. 44; *The Timor*, 14 C. C. A. 412, 67 Fed. 356; *Clark v. Barnwell*, 12 How. 272; *Transportation Co. v. Downer*, 11 Wall. 129. In the present case no question arose concerning the nature of the damage that had been sustained. The loss was wholly

from breakage. It is so alleged in the libel. The ship was not accountable for breakage. There was nothing, therefore, for the carrier to prove in order to place the loss within the clause which excepted liability. In this respect the case differs from some of those which are cited by the appellants, such as cases where the carrier had stipulated against loss by the perils of the sea. *The Giava*, 56 Fed. 243; *The Warren Adams*, 20 C. C. A. 486, 74 Fed. 413. In such a case the duty rests upon the carrier to show that the damage resulted from the perils of the sea. In the present case the stipulation was explicit. The nature of the injury indicated for itself that it belonged within the specified exemption from liability. The burden of proof therefore rested upon the libelants to establish by the evidence that the breakage occurred through the negligence of the ship's employés. No evidence having been offered to the court to prove such negligence, we find no error in the decree dismissing the libel. The decree will be affirmed.

THE PHOENICIA.

(District Court, S. D. New York. October 24, 1898.)

CARGO DAMAGE—LEAKY PORT—CONTACT WITH STONE SLUCEWAYS AT HAVRE—MISFITTING BLIND—CONFLICTING EVIDENCE—BURDEN OF PROOF—PROPER INSPECTION NOT PROVED—UNSEAWORTHINESS.

The new steamer *P.* on her first voyage from Hamburg to New York, when in mid-ocean on January 25th, was discovered to have a leaking port, by which cargo in compartment No. 4 was damaged. The port could not be screwed tight so as to stop the leak until the outside iron blind was removed; when that was removed the port was screwed water-tight. Upon arrival at New York the brass ring of the glass door was found to be bent inwards at the top and bottom $\frac{1}{16}$ of an inch, on a vertical axis. The port in question was near the bridge about two feet and one-half above the water line, and 175 feet aft of the stem. A few bolts were found a little loosened about this port, and in its vicinity, and there were some scratches there; but no bolts were loosened nor was damage done for 75 feet or upwards forward of the port, nor until about abreast of the foremast where there was again some damage on the same starboard side of the ship, which arose from contact with fenders on entering Havre or departing. The expert evidence showed that violent contact with the side of the ship where the port was, might cause the glass door to be sprung, or the blind to catch, as it was found when the leak was discovered. There was no proof of such inspection at Hamburg before the ship sailed as would show the port to have been then water-tight; *held* (1) that the burden was upon the ship to prove seaworthiness at the time of sailing; (2) that in the absence of sufficient inspection of the port to show seaworthiness on sailing, the ship took the risk of her inability to prove satisfactorily that the leak was caused in fact by the contact at Havre; (3) that upon a careful consideration of all the facts and circumstances, the ship had not sustained this burden, and the probabilities were against her contention that the leak was caused by the contacts at Havre, and that the ship was therefore answerable for the loss.

Cowen, Wing, Putnam & Burlingham, for American Sugar-Refining Co.

Butler, Notman, Joline & Mynderse, for Lamb et al.

Wheeler & Cortis and Everett P. Wheeler, for claimants.

BROWN, District Judge. The above four libels were filed in behalf of some 60 consignees to recover the damage to their goods, which were shipped at Hamburg in January, 1895, on board the new steamship *Phoenicia*, and damaged to the amount of about \$40,000 on the voyage to New York. The goods in question were all stowed in the between-decks of compartment No. 4, and consisted of a large quantity of sugar in bags, and much other miscellaneous merchandise, such as linen goods, hosiery, woollens, paper, rubber goods, earthenware, toys, musical instruments, hardware, feathers, barley, coffee, glassware, etc. The damage arose from sea water, which gained access to the compartment through a leak in one of the ordinary ports on the starboard side of the compartment a little above the water line.

The steamer sailed from Hamburg on January 14th, entered Havre at noon on the 16th, passing through two of the massive stone gateways from the Avant Port into the Bassin Bellot, and on the following high tide at about 1:40 a. m. of January 17th, left Havre by the same gateways and proceeded on her voyage. She met heavy weather almost constantly; and at 6 p. m. of the 25th of January, when near the Grand Bank, four feet of water was discovered in the well, coming from heavy dripping from beneath the between-decks of No. 4 compartment. Immediate examination disclosed the leak in question. With every roll of the ship two jets of water spurted through the port, one near the top and another near the bottom, by reason of the fact that the brass ring that held the window of the port did not close tightly upon the rubber bed against which it shut, but was bent inwards for a few inches along the top and bottom about $\frac{1}{16}$ of an inch. This discovery was made about $8\frac{1}{2}$ days after the steamer left Havre; and there can be no doubt that the opinion of the master is correct that the leak had then been in operation for a considerable time; that the sugar had at first absorbed the water as it entered until the sugar was saturated and then melted; and after the waterways had become choked, and the movement of the cargo, in consequence of part melting, had at last worn away the wooden part of the iron flooring and carried away some of the bearings and screws, that holes were made in the deck sufficient to permit the water to run through it as found on January 25th.

The libels charge that the vessel was unseaworthy when she sailed, on account of the imperfection of the port at that time. The answers aver that the ship was in all respects tight and seaworthy, and that the leak was caused by sea perils arising on the voyage, without any fault of the ship or her owners, either from pounding in the heavy seas, or encountering some obstructions, or as a result of two or three unavoidable contacts with the stone gateways in entering and departing from Havre, whereby the port, which was previously tight, was sprung so as to leak. The answers also allege due diligence on the part of the owners to make the ship in all respects seaworthy; that if there was any defect in the port, it was a latent defect; that by the bills of lading, it was provided, that the ship and the owner should not be liable for any latent

defect, nor for any accident of navigation occasioned by any negligence or fault of any of the servants of the ship; that all questions arising thereunder should be governed by the German law, and that by the German law, these stipulations are valid.

The *Phoenicia* is a new steel steamship 460 feet long, 52 feet beam and 36 feet depth of hold. She was built near Hamburg and great pains were taken to make her in every respect a first-class ship. This was her first voyage. Her trial trip was made in the River Elbe on December 28, 1894, and she was then approved and delivered to her owners, and immediately after began to take cargo on board. The window of the port in question was 10 inches in diameter, a little forward of midships, nearly under the bridge, and would touch the water line upon a mean draught of $26\frac{1}{2}$ feet. On her trial trip she was light, and this port was then from 10 to 12 feet above water. On entering Havre her mean draught was 23 feet 9 inches so that the lower edge of the port was 2 feet 6 inches above the water line; and on leaving Havre, where she took on cargo, though none additional was taken in No. 4 compartment, her draught was 4 inches greater, so that the port was then 2 feet 2 inches above water.

It is evident that if at the time of sailing the port was loose and leaky, as when found on January 25th, a leak so near the water line would render the steamer unfit for the carriage of cargo in that compartment, and that the loss should be charged to the ship. Nor could such a defect, if it then existed, be regarded as a "latent defect"; because it was easily discoverable upon inspection by the water test; a test which is easily made, and which according to the evidence is customarily made, and which reasonable prudence requires to be made, as respects ports so near the water line, before a ship sails on her first voyage. This test can be easily applied with the hose. It was applied to the decks in Hamburg, and afterwards twice applied to this glass port at New York. The particular description of the inspection made at Hamburg shows, however, that this test was not applied to any of the ports before the ship sailed from Hamburg; nor was the "chalk test" applied, which also tries the tightness of the fit. The only inspection and test there applied were to try the outer blind to see if it would go in and out, and to screw up tight the glass door and the inner cover; and that would not disclose any such leak as this, although it existed at that time precisely as when it was discovered on January 25th. Had either the water test or the chalk test been applied, there is no doubt that if any defect in this port then existed, it would have been discovered; and if it had been proved by any such test that no leak was then discoverable, no reasonable doubt would have remained that the defect arose upon the voyage, and thus the chief difficulty in the case would have been removed.

For the principal difficulty is not so much a theoretical one, whether such a leak in a sound port might possibly be produced on the voyage by the causes alleged; but whether there is such satisfactory evidence showing with a reasonable degree of certainty that the faulty condition of the port and consequent leak did arise

on the voyage, as to dispense with proof by some proper and actual test that the port was tight when the ship sailed.

A further question arises upon whom the burden of proof in this respect rests; and in case of doubt, whether the ship or the merchant shall bear the loss. Upon the latter point, the law, as I understand it, is that the burden of proof rests upon the ship. In *The Edwin I. Morrison*, 153 U. S. 199, 211, 215, 14 Sup. Ct. 823, the decision turned essentially upon this principle. It was there repeatedly stated by Chief Justice Fuller in delivering the opinion of the court, that it is for the owners to show affirmatively the safety and sufficiency of the ship's condition when she sails, by making all ordinary and reasonable tests. If the determination of the question of the ship's sufficiency is left in doubt, "that doubt must be resolved against the owners." The burden is upon them, it is said, "to show seaworthiness; and if they do not do so, they fail to sustain that burden, even though owners are in the habit of not using the precautions which would demonstrate the fact." "In relying upon external appearances in place of known tests," the respondents, it was held, "took the risk of their inability to satisfactorily prove the safety of the cap and plate, if loss occurred through their displacement."

These observations seem to me precisely applicable to the present case, as regards the tightness of the port in question when the *Phoenicia* sailed. There as here the question was whether the defective condition arose from sea perils on the voyage, or from defects existing at the beginning of the voyage.

A great mass of testimony has been taken in the present case and it has been prosecuted with extreme assiduity and skill, especially in the expert evidence. The proof shows that at least in the opinion of experts it is theoretically possible that the brass frame of a sound port might be so sprung or bent through collision with fenders, stone gateways or sea wreckage, as to produce a leak like this. But there is no evidence of the presence of sea wreckage; and though contact of the forward part of the ship with fenders in the sluiceways at Havre is proved, the evidence of any actual contact with this port is at best argumentative, and rests on inference. There is no actual proof of any severe contact with this part of the ship, and the probabilities seem to me to be to the contrary.

There are, moreover, other causes of the leak that are equally possible, more simple, and as it seems to me equally probable, which might have existed when the vessel sailed; especially a misfit of the outer iron blind, preventing the ring of the glass window from shutting tight. In the absence of any such previous trial as would test this port, or of any such inspection as would show it to be tight when the ship sailed, both the evidence of any actual contact of this port with the gateways at Havre, and the inferences drawn from the supposed contact, seem to me to be too uncertain and too hypothetical to absolve the ship and throw the loss upon the cargo owner. The evidence does not show the actual cause of the leak with requisite or reasonable certainty. As a result of all the evidence,

the most that can be said is, I think, that some doubt may possibly remain as to the cause of the leak, which cannot be certainly solved; while a misfitting blind is the most simple and probable explanation. Either of two things might have made easy a satisfactory determination of the case, viz. some actual test of the port before sailing, or the production of the outer blind that caused the trouble. Unfortunately both are wanting, and wanting through the neglect of the ship to make the tests, or to preserve and produce the blind. In the absence of these proofs the evidence in the ship's behalf is not so clear as to remove the great doubt as to her seaworthiness on sailing as respects a properly fitting blind and glass door; and the probabilities as I have said seem to me to be against her in that regard. If this is the fair result of the evidence and circumstances, as I think it is, the risk and the loss must remain upon the ship. The *Edwin I. Morrison*, supra; The *Mascotte*, 48 Fed. 119, affirmed 51 Fed. 605. The importance of the case and the labor bestowed upon it by counsel, make it proper that I should state the reasons for this conclusion somewhat more in detail.

A proper understanding of the case requires attention to the structure of the port. It was made with two brass rings and two cast-iron shutters. The outer ring, set in a circular iron frame, is bolted fast into the outer plates of the ship, through which it projects about $\frac{1}{32}$ of an inch. It is flush with the side of the ship when the ship is painted. In the inner brass ring is firmly set the glass window or lens, nearly 10 inches in diameter. This ring is fastened on one side to the outer ring and frame by a massive hinge working horizontally, by which the glass door is opened and shut. The inner part of this ring shuts into the outer ring; the outer part laps over the outer ring and shuts upon it; and when this door is closed it is fastened to the outer ring and frame by a heavy screw bolt or lug opposite the hinge. To protect the glass from injury from without, an outside shutter or blind, consisting of a cast-iron circular disc, is placed in the outer ring outside of the glass window, and held inboard by a narrow rim along the exterior edge of the outer ring. The blind is designed to fit loosely, so as to be easily put in or taken out at will. The blind is about $\frac{3}{8}$ of an inch thick, and strengthened by two parallel ribs about $\frac{1}{4}$ an inch high and $\frac{1}{4}$ of an inch thick running across the disc about an inch from its center. Inside of the glass window is a circular cast-iron shutter, which is attached at the top by a massive hinge to the outer ring and frame and worked vertically in opening and shutting. When shut down upon the lens and its rim, it is fastened firmly by a heavy screw bolt or lug into the outer ring and frame upon the lower side opposite to the hinge. On the outer part of the exterior surface of the window ring, is a circular V-shaped projection or bead, designed to close water-tight upon and into a bed of rubber $\frac{3}{8}$ of an inch wide laid in a corresponding groove in the outer ring upon which the outer part of the lens ring shuts. In new rubber this V-shaped projection or bead may be imbedded $\frac{1}{4}$ of an inch or more; in older and harder rubber it would be less imbedded, but would be water-tight, according to the evidence, with

an insertion of $\frac{1}{16}$ of an inch or less. It is only by the close fit of this rubber bearing all around that water can be excluded. On the inner face of the glass ring there is a similar V-shaped projection fitting into a similar rubber bed in the inner cast-iron shutter, which closes over the whole from the inside. When the inner shutter is screwed down on the lens ring, this inner bearing, if fitting properly, excludes water, even if the glass lens should be broken, provided the outer bearing is also tight. For that contingency it is necessary that both bearings should be water-tight.

When this leak was discovered jets of water were found coming in for a space of four or five inches near the top and bottom of the lens ring, that is, between the inner and the outer ring; and it was surmised that the top and bottom of the inner brass ring might be somewhat bent inwards, though the evidence does not show that any such distortion was seen, or could then be seen by the eye; nor is it certain that any such distortion existed at that time before the attempts were made to screw the parts tightly together.

Four things were tried to stop the leak: First, an attempt to screw tighter the bolts of the glass door and inner shutter; but these, it was found, could be moved but very little; second, inserting a piece of wood under the hinge of the inner shutter and then screwing it down; this resulted in breaking one of the shanks of the inner shutter without stopping the leak; third, an additional rubber band was then inserted between the outer V-shaped bead and the rubber bed in the outer ring; but on screwing the ring tightly down upon the added rubber, the leak was but little diminished. Finally, the glass door was opened and the outer shutter or blind was pulled in, and the added rubber band was removed. The glass door was then shut and screwed down as usual and found to be tight.

From this it is evident that whatever may have been the precise cause of the leak, the removal of the outer blind cured it. It was the cast-iron disc alone that prevented the glass from being screwed down sufficiently to make a tight fit at the top and bottom between the exterior V-shaped bead and its rubber seat. While the outer blind was in, the glass door could not be screwed down so as to exclude water. When the blind was removed, the door was screwed tight without difficulty and there was no leak; and the rest of the voyage was made without any blind outside of the glass door. Upon arrival of the ship in New York it was found on examination that the brass ring that held the window was not true, but that the upper part of it at least was bent inwards about $\frac{1}{16}$ of an inch. Martin, the surveyor, who examined it, speaks only of the top being bent. Mr. Congdon, thought the bottom was also bent. But this slight irregularity of $\frac{1}{16}$ of an inch in the inner brass ring, whether it existed when the ship sailed or not, did not prevent the glass door from being closed tightly after the outer blind was removed; and as I have said there was no subsequent leak, though the heaviest weather of the voyage occurred afterwards, and the glass door received the full force of the waves without any pro-

tecting blind. At that time, at least, the blind operated as an obstruction to a tight fit; and when the attempt was first made to pull the blind in, the assistant engineer says it was caught and was only pulled in with the help of the waves. He found no other blind caught.

Both the above-named circumstances, viz. that the blind was caught, and that the door could not be screwed down tight until the blind was removed, suggest a misfitting blind as the cause of the trouble, which was not thrown out as it should have been. A properly fitting blind might, indeed, be thus caught by the sides of the outer ring in which it was set, if this ring was afterwards sufficiently strained and sprung to pinch it. The defendant claims that the ring was thus sprung by contact with the fenders at Havre. But the outer ring of Exhibit 16, produced as the one in question, does not show, according to Prof. Compton, any bending beyond $\frac{1}{32}$ of an inch at the top; the shortening of its diameter, if any, by bending at the top must have been considerably less, i. e. less than $\frac{1}{32}$ of an inch, and therefore, too minute to account for catching a blind with the required play, the models showing a play of $\frac{1}{8}$ of an inch; and the bend was too minute also to have any substantial effect upon the rubber fit. But more probably, as it seems to me, the blind may originally have been too large to go home perfectly in the interior of the ring, the sides of which are somewhat conical and narrowed outward; or it might bind, or not go home, because of irregularities or protuberances, such as are incident to iron castings, and which were not removed; or the blind might have been warped in casting. Screwing the glass door against a misfitting blind would make it seem tight, when it was not tight; and only the water test or chalk test, neither of which was applied to this port, would disclose the fact; and if the door was screwed down severely, as was done when this leak was discovered, some bending of the brass ring of the window would naturally result, as was shown by experiments made at the hearing. Thus all the abnormal conditions of the port itself would be answered by a misfitting or warped blind. That the blinds were sometimes defective is to be inferred from the first officer's statement that on examination "he had no cause to throw out one of the blinds"; but he also states that this blind had less play than the model (exhibit 9).

The blind itself, which is the proper proof on this subject, and which if produced would have settled this question, has not been produced in evidence. The assistant engineer, who removed it when the leak was discovered, says he threw it upon the cargo and did not see it afterwards. It does not certainly appear whether this same blind was taken to the first officer's room or not. Presumably it is not the same blind that was found by Mr. Martin in the rack near this port at the time when he carefully examined the port on Saturday evening after the *Phoenicia's* arrival at New York. For that blind, as he testifies, went in and out easily; and when the glass door was screwed down, the chalk test showed chalk at the top and bottom, though faintly; proving that the old glass door though bent $\frac{1}{16}$ of an inch still pressed the rubber;

while the ship's trial with the hose on Friday, the day before, according to the entry in the log, also proves that though pressing more lightly than at the sides, it was still water-tight. This trial of Friday must be presumed to have been for the purposes of the coming voyage, and therefore under the usual conditions required for the voyage, viz. with a blind in place; and as the old blind certainly prevented a water-tight fit, the blind used on Friday must have been a new one taken from the ship's stock or else the port could not have been tight. Moreover, there could not have been any object in trying this port with the hose on Friday without any blind in place; because the port had already been proved to be tight without any blind, by the last days of the previous voyage in the heaviest weather; and the object presumably was to test the sufficiency of the port for the coming voyage, as would naturally be done after supplying a new blind in place of the old one, which it was known had prevented a tight fit.

The blind which, according to the testimony was removed to the first officer's room along with the glass door, after the door was condemned by Mr. Martin for being untrue, was probably therefore the new blind taken from the ship's stock and used in those trials, and not the blind which had prevented the tight closing of the glass door and was thrown upon the cargo at the time when the leak was discovered. As the first officer, however, had charge of these articles, it is quite possible that the old blind was picked up and taken to his room previously. He states that the blind taken to his room and the old glass door of the port remained in his room until he left the service of the ship in the following May; but that the outer ring and frame were exchanged for similar ones taken from one of the closets on the upper deck after Mr. Martin's objection to the sufficiency of the port, and that a new door was put in from the ship's stock. Exhibit 16, having uniform numbers throughout, does not agree with this account, and it remains in doubt. It is obvious from the testimony, however, that the same blind must have been used in the officer's trial of the port on Friday, when he found it tight under the water test, and in Mr. Martin's examination of it on the following Saturday evening; and if the water test on Friday was made with a new blind, as it seems necessary to infer that it was, no doubt could remain that a defective blind was the sole cause of the leak, inasmuch as with a new blind the old glass door and outer ring screwed down water-tight. This fact, after Friday's water test, would naturally be immediately perceived by the first officer, who had charge of the ports and was responsible for having passed an imperfect blind; he would not naturally, therefore, be very active in producing the old blind, even if it were in his power to do so.

I have mentioned in detail all the dealings with the old port because these circumstances seem to me to be the most important ones in the case, as they are the only facts positively proved bearing immediately upon the cause of the leak. But even here one link in the chain does not rest upon direct and certain testimony; namely, that the blind used in Friday's water test was a new blind,

or even that any blind was then used at all, strong as the inference is that a new blind was used. I turn, therefore, to the circumstances and proof relied upon by the defendant to show that the leak was probably caused by the distortion of the glass door and outer ring, through contacts with the fenders in the sluiceways at Havre.

I have already observed that the bending of the top of the outer ring to the extent of $\frac{1}{32}$ of an inch only, as testified to by Prof. Compton, could not have caused a proper blind to catch, which in the models exhibited has $\frac{1}{8}$ of an inch play; nor could it have produced the leak between the outer and the inner ring. This last is conceded by Prof. Compton. What he testifies, however, might happen, and what the defendant contends did happen, is that the fender in passing over this port was forced inwards $\frac{3}{8}$ of an inch below the surface of the plates of the ship against the cast-iron circular blind (which was but $9\frac{1}{2}$ inches in diameter as the model shows), with such force as to bend inwards this cast-iron disc along its vertical axis against the ring of the glass door (which was not completely supported on that axis as it was on the horizontal axis by the hinge and bolt of the door) and thereby bent this ring inwards along the same vertical axis, so that when the pressure was removed, this bent ring, being of brass, a soft metal, and not having sufficient elasticity to resume its original position, as the cast-iron blind had, formed an opening through which the water came. The libelants' experts consider that such a bend and leak could not be produced in that way, for the reason that the vertical axis of the ring of the glass door had a sufficiently firm support to prevent it, in the hinge and lug bolt of the inner shutter, which, with the bolt and hinge of the glass door, formed four firm supports at each quadrant of the circle. Along the vertical axis, however, the rubber bed of the inner shutter was in part the support of the bead of the glass door; and Prof. Compton, as I understand, conceives that the further compressibility of the rubber bed would permit the further imbedding of the V-shaped bead sufficiently to admit of the bending described on the line of the vertical axis, and which the massive hinge and lug of the inner shutter could not prevent. The libellant's experts are of a different opinion, on the ground that the rubber, being confined in a narrow and shallow groove, would not admit of such an additional imbedding in the rubber after the door had been firmly screwed down. The correctness of these opposing theories was not tested by experiments, probably difficult to perform. (1) I do not presume to decide as between these two theoretical opinions; but inasmuch as any bending of the brass ring in the manner supposed would be limited by the possible additional imbedding of the V-shaped bead in its rubber seat, and as the recoil of the rubber itself after the pressure was removed, would certainly be great and would aid such elasticity as the brass itself possessed towards recovering its former position, it seems to me scarcely probable that the net result would leave a distortion of $\frac{1}{16}$ of an inch. (2) Even if this net result should be a bend of $\frac{1}{16}$ of an inch in the ring, the only effect would be to withdraw the V-shaped bead by so much from its previous imbedding; and

as this appears to have been about $\frac{1}{8}$ of an inch, an imbedding of $\frac{1}{16}$ of an inch would still remain. This with a proper blind would still leave the rubber bearing water-tight, as appears from the trial by Mr. Martin on Saturday evening, and from the water test applied the day before by the ship's officers. For Mr. Martin's chalk test showed that there was still contact at the top, though faint; and the ship's test showed that this same contact was tight. (3) There is no satisfactory proof that a cast-iron disc has sufficient elasticity to bend in the manner supposed; and when strengthened by two stout ribs, as above described, any such deflection of the blind through its center seems to me improbable. (4) It appears to me still more improbable that a fender 6 feet long with a central core of wood a foot square, surrounded by fagots bound together so as to be $3\frac{1}{2}$ feet in diameter and then flattened out while rubbing along the side of the ship about 120 feet, would have been forced $\frac{3}{8}$ of an inch below the plates of the ship against this cast-iron blind with such force as to bend it, even if it were to any extent flexible. Such a fender when it reached the port must have been flattened out to its extreme limit, forming a surface over 6 feet long and nearly 6 feet broad. The great bulk of the pressure upon such a fender would have been taken up by those parts of it which came in contact with the ship's plates, which would mostly protect the blind $\frac{3}{8}$ of an inch below from pressure. The defendant's expert says, and no doubt truly, that most of the elasticity of the fender after such a flattening out, would be gone; but for that very reason the pressure at the bottom of the port opening would be so much the less. The port and disc moreover were further protected from harm arising from so broad a fender, by the immovable resistance of the web frame of the ship, which was but three feet from this port. Considering these circumstances, and that the pressure of the fender must have been constantly diminished as it passed along aft and the small angle between the ship and the sluiceway when the fender was near midships, it seems to me that only a very slight pressure could have descended through the opening upon this blind. Even if it appeared, therefore, that the fender rubbed over this port, it would still seem to me improbable that that caused the leak.

More important is the absence of sufficient proof to establish the fact of any contact between the fenders and this port. A casual or ordinary contact, such as might scratch through the paint or loosen a few bolts a single turn only, like these, as often happens in rounding the corners of piers in making a landing, would not be sufficient. Such ordinary contacts do not come within the exception of sea perils. To sustain the defense it is indispensable not only that contact with the glass port should be clearly established, but that the contact was of an unusual character. There is, however, no direct evidence of any contact at all between the fender and the port; and if there was any, the probabilities are that it was so slight as not to be noted or observed by those officers who were in the best position to observe it. The defendant's contention in this regard rests wholly on the first officer's testi-

mony and in fact upon his inferences, rather than upon anything that he saw. On entering Havre, there was a contact with two fenders on the south side of the outer gateway on the starboard side of the ship, beginning as the pilot testifies, a little forward of the foremast and continuing for 10 or 12 feet, when the course of the ship was righted sufficiently to pass through. The port in question was 120 feet aft of the point where the ship touched; so that if the pilot's evidence is correct, this port could not have been injured on entering Havre. The pilot further testifies that this was the only time she struck her starboard side. By that contact two fenders made of fagots as above stated and bound together so as to be $3\frac{1}{2}$ feet in diameter and about 6 feet long, were flattened out. The injuries to these fenders were duly reported to the French authorities, and the damage was charged to the ship. On leaving Havre there was likewise a contact with two other fenders on the south side of the inner gateway, that is, on the port side of the ship, by which those fenders were flattened; and that damage was also reported to the authorities and charged against the ship.

The first officer testifies with some detail to a third contact, and this is the one mainly relied upon by the claimants, viz. a contact on leaving Havre on the starboard side of the ship with the fenders on the north side of the outer gateway, caused by the Phoenicia's aft davits striking the bows of the Scotia; but several of the particulars to which this officer at first testified are proved to be incorrect; and on cross-examination it appears that he did not see those fenders at all, and that he testified only from his inferences from the noises heard, while he stood far forward in an unfavorable position for observation, having stood first with his hand on the stem and running aft only about 40 or 50 feet, which was still 120 feet forward of this glass port. He is not confirmed as regards contact with this port by any other witness, though four officers on the bridge were in a much better position than he was to observe such a contact if it occurred. It evidently was not known to the pilot or the master; and the third and fourth officers, who were on the bridge, were not called as witnesses, and presumably therefore would not confirm him. The master furthermore testifies that the collision with the Scotia caused no damage to the hull of the Phoenicia, which he would not have stated had it produced a damaging contact with the sluiceway. No damage to any fender on that side of the sluices was reported; whereas if there had been any such contact as the first officer describes, the fenders must have been injured, and the fact would have been reported. He testifies moreover that he does not remember the contact on going into Havre, which is abundantly proved; so that I have no doubt that the first officer is mistaken as to this contact.

The master casually refers to a contact on the starboard side in coming out; but he says that afterwards the Phoenicia touched the Scotia; so that it is clear that the contact to which the master refers was a trivial contact in the inner sluiceway and not a serious contact in the outer sluiceway, such as the first officer supposes. The fact moreover that the master caused to be erased the mate's

entry in the log ascribing the scratches, loosening of bolts, and the leak to the contacts at Havre, and that in his protest filed on arrival the master made no allusion to these contacts, shows clearly that he did not know of any such contacts at Havre, or believe in any such contacts as would have naturally caused this damage; and this applies to the contact on entering Havre as well as to the contact on leaving.

The fact also that all damaged fenders were required to be reported to the government and charged for, and that two contacts only were so reported, leaves no doubt in my mind, in connection with the pilot's explicit testimony, that the only contacts serious enough to damage the fenders occurred on the south side of the gateways, which was the port side of the ship on coming out; and any contacts which would not damage the fenders, would not hurt the ports. The fenders in the outer sluiceway, moreover, were from four to six feet above water, while the center of the port in question was not over two feet eight inches above water. The fenders, therefore, could not have touched this port unless they were damaged by being flattened out or broken; and in that case they would have been reported. For these reasons, I cannot find any probable damage done to the port on leaving Havre.

As an alternative, it is urged that the injury may have been done by the admitted contact with fenders on entering Havre, which began abreast of the foremast, about 125 feet forward of the port; and that the pilot must be mistaken in his testimony that this contact continued for only 10 or 12 feet, since with 2 knots speed that distance would be covered in less than 4 seconds. I see nothing improbable, however, in a brief contact of from 4 to 8 seconds if the vessel was moving slowly at the rate of from 1 to 2 knots. Doubtless the pilot's estimate is not exact; but it is not probable that he would mistake 10 or 12 feet for upwards of 100 feet, or that he would fail to notice the fact, if the fenders rubbed the ship as far aft as the bridge, where he stood. His evidence indicates a brief contact, after which the ship righted so as to pass through. No other witnesses describe this contact differently. He says that having ported, "the vessel's head swung a little too far to starboard and squeezed the fenders, commencing at a point about abreast of the foremast, strong enough to straighten the vessel on her course, and we passed through the gates without any further contact." This was at noon, in full view of scores of officers and men on deck; and the fact that none of them describe it as a continued rubbing, does not permit me to disregard the pilot's testimony.

But even if the contact continued at all so far aft as to reach this port 125 feet from where it began, it is difficult to believe that at that time there could have continued to be any unusual or damaging pressure from these broadly flattened fenders. As the ship swung off forward so as to go through straight on her course, as the pilot testifies, the pressure would be relieved further aft, and at the bridge near amidships, if the ship could there touch at all, would naturally be almost nil. The pressure must have diminished rapidly after the *first or second impact*, and the greatest damage would have been

done to the ports and bolts further forward, where the pressure was greater. Here on the contrary, there was no damage done except in the immediate vicinity of this port, and near the foremast where the fenders first struck; while in a space of 75 or 100 feet between, no bolts even were loosened. The loosening of the bolts aft appears to have been trifling, amounting only to a single turn; and the complete separation of the damage forward from the loosened bolts and scratches amidships, indicates a different cause for the amidships damage, which was only such as often occurs in rounding the piers in landing. It is the same with the scratches referred to. The evidence as to their nature and extent is very contradictory. If any deep scratches were made in passing over the port, the soft brass metal of the outer ring would have shown them most; and this would have supplied a sure means of finding and identifying the old outer ring said to have been put on the upper deck; whereas it could not be found by the first officer; and Exhibit 16 does not show scratches.

The pilot says that the contacts were not of sufficient force to produce damage to the ship's plates; but were sufficient to produce damage to any port or bull's eye "in the immediate vicinity of the point of contact"—"to cause damage to the port near that point." I understand the pilot in this testimony to refer to the contacts as he described them: viz., brief contacts which squeezed the fenders and straightened the ship upon her course. He says he was not aware of any ports so low down on the side of the ship; and there was no port so low in the vicinity of the foremast, to which vicinity the contact, as he knew it, was confined. He told the captain, he says, "about the pressure against the fenders." Had either of them known of any serious contact of the fenders so far aft as the bridge, by which the ports were likely to be squeezed, a cursory exterior examination at least would have been made of the ports and bolts before the vessel left Havre, which would have disclosed the loose bolts if any then existed. That no examination was made, satisfies me that the master and pilot knew of no such contact in that part of the ship, while they would have known it if it had occurred. When the captain corrected the log after arrival in New York and omitted all reference to the contacts at Havre in his protest, it was because he did not think that those contacts were the cause of the trouble. The considerations in support of that opinion seem to me to be such and so many as to forbid my finding that the ship has established the contrary with any such reasonable clearness and certainty as to relieve the ship from the necessity of giving satisfactory proof of a seaworthy condition of the port at the start, by the tests necessary for that purpose.

Decrees for libelants with costs.

LANCASTER et al. v. ASHEVILLE ST. RY. CO. et al.

(Circuit Court, W. D. North Carolina. November 10, 1898.)

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF PARTIES—LOCAL ACTIONS.

Under the judiciary act of 1888 (25 Stat. 433), a circuit court of the United States cannot entertain a personal action by joint plaintiffs who are citizens of different states against a defendant who is not an inhabitant of the district where the action is brought, but such provision does not affect the jurisdiction of the court in local actions to enforce a lien or claim upon real estate or personal property within the district.

2. RECEIVERS—GROUNDS FOR APPOINTMENT.

To justify a court of equity in appointing a receiver pendente lite, the plaintiff must show at least a probable interest in the property, and there must exist a well-grounded apprehension of immediate injury to such interest unless the property is taken in charge of by the court.

3. SAME—DISPLACEMENT OF ANOTHER RECEIVER.

A receiver will not be appointed by a federal court for a street railroad in a suit by bondholders to which other creditors, holding a large part of the road's indebtedness, are not parties, where no fraud or bad faith towards plaintiffs is shown, and the property is already in the hands of a receiver appointed by a state court, whose management is shown to be excellent, and to meet the entire approval of those most largely interested.

Duff Merrick and C. A. Webb, for plaintiffs.

F. A. Sondley and R. Burnham Moffat, for defendants.

EWART, District Judge. This is a bill in equity filed by G. W. Lancaster, a citizen of the state of Florida, and Jeanette H. Martin, a citizen of the state of Massachusetts, against the Asheville Street-Railway Company, the Asheville Street-Railroad Company of Asheville, N. C., the Atlantic Trust Company of New York, W. A. White, A. M. White, and Alfred T. White, individually, and as trading under the firm name and style of W. A. & A. M. White, citizens of New York, and George B. Moffat, a citizen of New York. The Asheville Street-Railway Company on the 2d of July, 1888, became the owner of a certain street railway in the city of Asheville, and operated the same by virtue of its charter and certain franchises granted to it by the city of Asheville. On the same date, to wit, July 2, 1888, it executed and issued first mortgage bonds to the amount of \$50,000. To secure the payment of said issue of bonds the said Asheville Street-Railway Company duly executed and delivered to the Atlantic Trust Company (a corporation organized and existing under the laws of the state of New York, and a citizen of that state, with its principal place of business in New York) its certain first mortgage or deed of trust, thereby conveying to the latter, as trustee, all of its property and franchises then owned, and all that might hereafter be acquired. The plaintiff Lancaster became the purchaser of 8 of these first mortgage bonds, of \$500 each. The plaintiff Jeanette H. Martin also acquired and is now the owner of 4 of the first mortgage bonds, of \$500 each. Prior to the commencement of a suit in this court entitled "Atlantic Trust Company v. Asheville Street-Railway Company and the Asheville Light & Power Company," the Asheville Street-Railway Company paid off, took up, and retired 48 of the said first mortgage bonds, leaving outstanding only 52 of the said bonds, among

which are those held and owned by the plaintiffs. On the 1st of July, 1890, the defendant the Asheville Street-Railway Company executed and placed upon the market for sale another issue of bonds, amounting to \$100,000, and, to secure payment of the same, executed and delivered a second mortgage upon all its property and franchises to the Atlantic Trust Company. Only 74 of said mortgage bonds were ever sold, and of this number W. A. White and A. M. White were large holders. On the 29th of April, 1898, because of default made in the payment of the interest then due on said bonds, the Atlantic Trust Company, as trustee, brought suit in the United States circuit court against the Asheville Street-Railway Company and the Asheville Light & Power Company, a corporation, whose property had been secured by the Asheville Street-Railway Company, for the purpose of foreclosing said mortgage or deed of trust, entitled "Atlantic Trust Company, Trustee, vs. Asheville Street-Railway Company and the Asheville Light & Power Company." In this suit a decree was rendered by which all the property of the Asheville Street-Railway Company, as conveyed in and by second mortgage, was sold, and purchased by A. M. White, "purchasing in behalf of himself and his associates, forming a corporation to be known as the Asheville Street-Railroad Company, under section 697, c. 16, Code N. C." This sale was confirmed, and a deed duly executed and delivered to the said Asheville Street-Railroad Company by the commissioner designated by the court to make such sale. By the terms of said sale, as expressly set forth in the said order of sale, the decree of confirmation, and the said deed, the said defendant the Asheville Street-Railroad Company took all the said property, subject "to the lien of the twenty-six thousand dollars of bonds secured by the mortgage or deed of trust executed by the Asheville Street-Railway Company to the Atlantic Trust Company, as trustee, dated July 2, 1888," which is the first mortgage. There has never been any decree of foreclosure in this or any other court as to said first mortgage or deed of trust. Shortly after, the defendant the Asheville Street-Railroad Company went into possession of the said property; and on or about the 7th of January, 1895, the sheriff of Buncombe county, by virtue of an execution issuing from the superior court of said county upon a certain judgment therein docketed in favor of one Sarah Cawfield against the Asheville Street-Railway Company, sold to one C. A. Moore all the franchises and property hitherto conveyed to the Asheville Street-Railroad Company by A. T. Summey, commissioner, and put the said Moore in possession thereof. Immediately thereafter the Asheville Street-Railroad Company brought suit in the superior court of Buncombe county against the said C. A. Moore for the possession of the said property, alleging that the sale was irregular, fraudulent, and void. Pending this suit one J. E. Rankin was appointed receiver of all the property in controversy between the parties, and is now acting in such capacity. The suit of the Asheville Street-Railroad Company against C. A. Moore is still pending in the said superior court. In September, 1892, defendant George B. Moffat purchased from C. A. Moore and Sarah Cawfield the Cawfield judgment, and the claim of title of the said Sarah Cawfield and Charles A. Moore, paying therefor the sum

of \$3,250. Deeds were executed by the said C. A. Moore and wife and Sarah Cawfield to Moffat conveying all interest that the said Moore and Cawfield had in the said property or franchises of the Asheville Street-Railroad Company. The defendant Moffat is a son-in-law of William A. White. After the purchase of this judgment and claim of title from Moore and Cawfield by Moffat, no efforts appear to have been made on the part of the Asheville Street-Railroad Company or the Whites or the said George B. Moffat to secure a final judgment in the cause pending in the superior court entitled "The Asheville Street-Railroad Company v. C. A. Moore." Nor has the said Rankin been discharged as receiver of such company. The judgment of Sarah Cawfield against the Asheville Street-Railroad Company, under which Moore claims to have purchased, was recovered for a personal injury, and, by virtue of a North Carolina statute, is a lien paramount upon the property of the Asheville Street-Railroad Company. Coupons for the interest due July 1, 1895, upon bonds held by the plaintiffs, Lancaster and Martin, were promptly presented for payment at the office of the Atlantic Trust Company, in the city of New York, but payment was refused; the reason assigned being, "No funds." All the coupons maturing since July 1, 1895, are unpaid. After the purchase of the property and franchises of the Asheville Street-Railway Company there was a reorganization, the new company being known and designated as the Asheville Street-Railroad Company. Of the \$100,000 bonds issued, \$26,000 thereof were set apart to take up and redeem the outstanding first mortgage bonds of the Asheville Street-Railway Company, and \$23,000 to take up and redeem all outstanding receiver's certificates; and the payment of both certificates and bonds was made a liability upon, and assumed by, said railroad company, both in its decree of sale and in the deed of conveyance. On the 18th of April, 1898, the plaintiffs made a written demand upon the Atlantic Trust Company that they foreclose said deed of trust in accordance with the terms of said instrument, accompanying said request with an indemnity bond. The Atlantic Trust Company declined to do so, alleging as a reason for such refusal that a majority of the bondholders had not joined in such request for foreclosure, as set out in the mortgage executed July 2, 1888. The mortgage referred to contained the following provisions, viz.:

"In case default shall be made in the payment at maturity of the principal money hereby secured, or any part thereof, and shall continue for a period of six months, then the said party of the second part and its successors is and are, upon a written request of a majority of the holders of such bonds as shall then be outstanding, authorized and empowered to enter into and take possession of the property hereby conveyed." "And in case of the default in the payment of either the principal or the interest of said bonds, or any part of either, as either become due, and such default continuing for the period of six months, then the party of the second part, at the written request of the holders of a majority of the outstanding bonds, accompanied by an indemnity as hereinbefore provided, shall, with or without entry, and in its discretion, sell the property hereby conveyed. * * *

The plaintiffs ask: First. For a writ of injunction restraining and enjoining the defendants the Asheville Street-Railway Company, the firm of W. A. & A. M. White, its individual members, and George B.

Moffat from in any way disposing of any of the property hereinafter mentioned, and from proceeding in any manner in the cause entitled the "Asheville Street-Railroad Company v. Charles A. Moore," now pending in the superior court, Buncombe county, until the further orders of this court. Second. For the appointment of a receiver, with full power and authority on the part of such receiver to manage and operate the said Asheville Street-Railroad Company under the directions of the court. Third. For judgment against the defendants the Asheville Street-Railway Company, W. A. White, A. M. White, and Alfred T. White, individually, and as composing the firm of W. A. & A. M. White, and in favor of George W. Lancaster, for the sum of \$4,000, with interest thereon at the rate of 6 per cent. per annum, payable semiannually, from January 1, 1895, and in favor of Jeanette H. Martin for the sum of \$2,000, with interest thereon at the rate of 6 per cent. per annum, payable semiannually, from January 1, 1895, and for costs. Fourth. For a decree of sale of properties conveyed in the first mortgage described in the bill of complaint. Fifth. That the deeds executed by C. A. Moore and wife and Sarah Cawfield to the defendant George B. Moffat be declared fraudulent and void as to plaintiffs; that the said defendant Moffat be declared to hold said property only in trust for the benefit of plaintiffs, and other creditors in like relation, according to their respective interests. Sixth. For such other relief as to the court may seem fit, and as may be necessary to fully protect and enforce their rights and equities.

Upon the oral argument, counsel for the defendants suggested a question as to the jurisdiction of the court to hear this cause, and cited *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303. The case cited is applicable to the defendants W. A. White, A. M. White, and Alfred T. White, individually, and as trading under the firm name of W. A. & A. M. White; and the action is dismissed as to them. It has no bearing, however, in so far as the other defendants are concerned. The case of *Smith v. Lyon* involved only the rights of parties to personal actions, residing in different districts, to sue and be sued, and was entirely unaffected by the act of 1888 (25 Stat. 433), which deals with defendants only in local actions, and expressly reserves jurisdiction if the suit be one to enforce a lien or claim upon real estate or personal property. *American F. L. M. Co. v. Benson*, 33 Fed. 456; *Carpenter v. Talbot*, Id. 537; *Ames v. Holderbaum*, 42 Fed. 341; *Wheelwright v. Transportation Co.*, 50 Fed. 709; *McBee v. Railway Co.*, 48 Fed. 243; *Spencer v. Stock-Yards Co.*, 56 Fed. 741. In line with these cases, and almost directly in point, are decisions of the supreme court of the United States. *Vide Goodman v. Niblack*, 102 U. S. 556; *Mellen v. Iron Works*, 131 U. S. 352, 9 Sup. Ct. 781. See, also, *Greeley v. Lowe*, 155 U. S. 58, 15 Sup. Ct. 24, and *Dick v. Foraker*, 155 U. S. 411, 15 Sup. Ct. 124, both of which decisions appear to be directly in point.

This question of jurisdiction being settled, the next is, are the plaintiffs entitled to the appointment of a receiver? The plaintiffs having abandoned in the argument all charges of fraud, collusion, and bad faith contained in their bill, and admitting that these charges were unfounded, the case must be considered as one involving no

question of either fraud or collusion. And, if this admission had not been made by plaintiffs' counsel, there is no evidence whatever tending to support any charges of fraud or collusion against the defendants the Whites, the Asheville Street-Railway Company, the Atlantic Trust Company, or George B. Moffat. The exercise of the extraordinary power of a chancellor in appointing a receiver, or in granting writs of injunction or ne exeat, is an exceedingly delicate and responsible duty, to be discharged by the court with the utmost caution, and only under such special or peculiar circumstances as demand summary relief. It is a peremptory measure, whose effect, temporarily at least, is to deprive a defendant in possession of his property before a final judgment or decree is reached by the court, determining the rights of the parties. And since it is a serious interference with the rights of the citizen, without the verdict of a jury, and before a regular hearing, it should only be granted for the prevention of manifest wrong and injury. The principal grounds upon which courts of equity grant their extraordinary aid by the appointment of receivers *pendente lite* are that the person seeking the relief has shown at least a probable interest in the property, and that there is danger of its being lost unless a receiver is allowed; the element of danger being an important consideration in the case. A remote or past danger will not suffice as a ground for the relief, but there must be a well-grounded apprehension of immediate injury. 5 *Thomp. Corp.* § 6823; *High, Rec.* § 8; *Kennedy v. Railroad Co.*, 2 *Dill.* 448, *Fed. Cas.* No. 7,706; *Hanna v. Hanna*, 89 *N. C.* 71; *Rollins v. Henry*, 77 *N. C.* 467; *Bryan v. Moring*, 94 *N. C.* 698; *Moore v. Mining Co.*, 104 *N. C.* 541, 10 *S. E.* 679. The court will not act upon a possible danger only. The danger must be great and imminent, and demanding immediate relief. *Gause v. Perkins*, 56 *N. C.* 181; *McCormick v. Nixon*, 83 *N. C.* 113. Nor will the court interfere by injunction merely to prevent a cloud upon the title. *Hutaff v. Adrian*, 112 *N. C.* 260, 17 *S. E.* 78; *Browning v. Lavender*, 104 *N. C.* 69, 10 *S. E.* 77; *Cunningham v. Bell*, 83 *N. C.* 328; *Southerland v. Harper*, *Id.* 200. It is the duty of the court, in passing upon a motion for an injunction or the appointment of a receiver, to consider the consequences of such action upon both parties; and it ought not to interpose unless it is satisfied that the property is being mismanaged and in danger of being lost, or that it is in the possession of an insolvent or unfit trustee. *Venable v. Smith*, 98 *N. C.* 523, 4 *S. E.* 514. There is not an iota of testimony that the property of the Asheville Street-Railroad Company is being mismanaged, or that it is in danger of being lost, or that it is in the possession of an unfit or incapable trustee. On the contrary, it is conceded by the plaintiffs' counsel that there has been marked and rapid enhancement of the value of the property under the management of J. E. Rankin, and it is also conceded that he has proven a most capable and competent receiver. Nor is there any evidence that the defendant George B. Moffat purchased the Moore and Cawfield claims adversely to the railroad company, or that there was the slightest collusion between the defendant Moffat and the Whites to hinder, delay, or defraud

the plaintiffs, or any other persons interested. On the contrary, the said defendant Moffat declares "that it is absolutely and unqualifiedly untrue that there is or ever has been any collusion whatever between me and the firm of W. A. & A. M. White, or any member thereof, and that it has never been, and is not now, my intention to avail myself of the judgment and title acquired by me in order to assert the paramount lien which was asserted thereunder by the said Cawfield and Moore, unless I shall become satisfied that the company would be unable to pay me my advances and interest." The defendant Moffat moreover declares in his affidavit filed in this cause "that I have been and am at all times now ready and willing to satisfy said judgment of record, and to assign to said railroad company my claim of title, whenever such company shall pay to me my advances, interest, and expenses." Nor is there any evidence that there has been any fraud or collusion between the Atlantic Trust Company and the Whites, either as a firm or as individuals, by which a foreclosure of the first mortgage bonds has been prevented. On the contrary, the Atlantic Trust Company have declared their willingness to foreclose the first mortgage bonds whenever requested to do so by the majority of the holders of the first mortgage bonds, as set out in the mortgage executed by the Asheville Street-Railway Company to the Atlantic Trust Company July 2, 1888. And it also appears in the proof that the Whites, as a firm, are not owners of a majority of the first mortgage bonds of the Asheville Street-Railway Company, as alleged in the plaintiffs' bill. On the contrary, many of the first mortgage bondholders are not known, and are not parties to this proceeding. The holders of the receiver's certificates and judgments against the Asheville Street Railway are entitled to liens prior to the bonds of 1888. Then, too, there are stockholders and bondholders of the defendant street-railway company, whose interests in this property are large. All of these are entitled to be heard before a receiver is appointed, who may possibly put their securities in peril. *Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. 556. While it is true that the plaintiffs, Lancaster and Martin, have not received any interest since July 1, 1895, it does not appear that the nonpayment of the said interest has occurred because of any disposition on the part of the said defendant, the Asheville Street-Railway Company, or of its present receiver, Mr. Rankin, to defeat, hinder, or delay the said Lancaster and Martin in the collection of the said interest. On the contrary, it appears from the affidavits of J. E. Rankin, the receiver, that when he assumed charge of the said property its condition was bad, and its entire equipment in a worn and unsatisfactory state; that he at once began to make in the property improvements of an extensive and permanent character, and has continued these improvements up to date; that all of these improvements were made with the earnings of said property while in his hands, and that he has appropriated the entire income of the property in the said improvements; that, of the gross income of the road,—something in excess of \$180,000,—at least \$40,000 has been expended in permanent improvements and enhancement in value of the said property.

Mr. Alfred M. White, the largest bondholder, declares that Mr. Rankin's receivership has inured greatly to the advantage of the road, and to the increased security of all the holders of liens thereon, including the first mortgage bonds of the old Asheville Street-Railway Company; that when Mr. Rankin was appointed receiver the physical condition of the road was at low ebb, and its earning power insufficient to pay maintenance, operation, and fixed charges; that under his management the physical condition and earning capacity have largely increased; and that the company will soon be in a condition, financially, to purchase for and in the name of the company the adverse claims now held by George B. Moffat. It does not appear upon the proofs submitted that the defendant the Asheville Street-Railroad Company or the defendant George B. Moffat is purposely delaying the settlement of the case of the Asheville Street-Railroad Company against Charles A. Moore, as insisted by plaintiffs' counsel, with a view of defeating, delaying, or hindering the plaintiffs in the collection of the interest on their bonds, and continuing the receivership of Rankin for such purpose. But, on the contrary, it appears that such settlement has not been made because the directors of the company have good reasons to believe that none of the security holders are in reality prejudiced by the receivership continuing until that time. The able counsel for the petitioners contend with some force that Moffat might become insolvent or die, and that in either of these events further complications would arise, thereby delaying, hindering, and perhaps defeating entirely, the claims of petitioners. But courts cannot appoint receivers simply upon barely possible contingencies, or act upon possible dangers only. The danger must be great and imminent, and demand immediate relief. Moreover, in view of the affidavit filed by Moffat, it appears that neither his death nor insolvency could possibly affect the claims of the petitioners. This property is now in the hands of a receiver appointed by a state court, and one who it is conceded is a most capable and efficient officer. The appointment of another receiver to take charge of this property, and of suits which are now pending in another court, could only result in expensive and protracted litigation, thereby greatly depreciating the value of the property of the Asheville Street-Railroad Company, and making it the more impossible for such company to pay off and discharge its first mortgage bonds now outstanding.

The application for a receiver is refused, and the injunction hitherto granted against the said Asheville Street-Railway Company, the Asheville Street-Railroad Company, and George B. Moffat is hereby dissolved. The defendants are entitled to their costs, to be taxed by the clerk of this court.

STAFFORDS et al. v. KING.

(Circuit Court of Appeals, Fourth Circuit. November 1, 1898.)

No. 275.

1. JURISDICTION OF CIRCUIT COURT OF APPEALS—CONSTITUTIONAL QUESTION.

Under the rule that the circuit court of appeals cannot entertain an appeal from an order granting or refusing a temporary injunction, unless it might have jurisdiction of an appeal from the final decree in the suit, where a suit to restrain the cutting and removal of timber from land was based on an allegation of title in complainant, to which defendants pleaded that plaintiff's title had become forfeited under a state statute, and also title in defendants by adverse possession, an amended bill averring that the state statute was in contravention of the constitution of the United States does not deprive the circuit court of appeals of jurisdiction of an appeal from an order granting an injunction, since the court, on final hearing, might sustain the title of the defendants on the ground of adverse possession, rendering a determination of the constitutional question unnecessary.¹

2. INJUNCTION—ORDER OF DISSOLUTION—EFFECT OF SUPERSEDEAS.

While an appeal from an order dissolving an injunction, though with a supersedeas, does not reinstate the injunction in force, yet the court may, in its discretion, do so by an affirmative order; and where, in the order allowing the appeal and supersedeas, the court provided that pending such appeal the order dissolving the injunction should stand suspended and superseded, and after a decision by the circuit court of appeals affirming the order of dissolution, but before its mandate had been sent to the circuit court, the cause and record were removed to the supreme court by a writ of certiorari, the injunction remains in force, and must be respected and enforced until final disposition of the case in the supreme court.

3. SAME—INJUNCTION BOND—WHEN REQUIRED.

An order granting an injunction against the cutting of timber, and appointing a receiver to take possession of timber already cut by defendants, although based on a holding that a former injunction to the same effect still remained in force, which claim, however, was contested, should require an injunction bond from the complainant and a bond from the receiver.

Appeal from the Circuit Court of the United States for the District of West Virginia.

This was an appeal from an order granting an injunction against the cutting of timber, and appointing a receiver to take possession of timber previously cut by defendants.

Z. T. Vinson and John H. Holt, for appellants.

M. F. Stiles, for appellee.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. This case comes up on appeal from the order and decree of the circuit court of the United States for the district of West Virginia, granting a temporary injunction. The case has been given precedence under the act of March 3, 1891 (26 Stat. 826). It presents important questions of practice, and will be stated in detail.

¹ As to jurisdiction of the circuit court of appeals, see note to *Lau Ow Bew*, v. U. S., 1 C. C. A. 6.

The complainant claims to be the owner of a grant from the state of Virginia, bearing date 28th October, 1794, originally made to Robert Morris, and covering 500,000 acres of land. The entire tract covers land in Virginia and Kentucky, and in the counties of Mingo, Logan, Wyoming, and McDowell, in the state of West Virginia. He sets out the manner in which, through intermediate conveyances, the title from the original grantor has come down to him. Asserting his title, he brought several actions in ejectment against persons who were exercising, as it was alleged, acts of ownership within the lines of this grant, in the circuit court of the United States for the district of West Virginia. Among the defendants to these suits were defendants to this bill, Alexander Stafford, W. E. Justice, Levi Browning, F. M. Trent, O. F. Ferrall, Wayne McDonald, and Leander Ellis. Pending the actions of ejectment, and as ancillary thereto, the complainant filed in the same circuit court of the United States bills praying injunctions against the defendants in the ejectment suits, restraining them from cutting and removing timber on the lands claimed by the complainant pending said suits of ejectment. Temporary injunctions were thereupon granted by the circuit court. These injunctions being of force, one of these actions of ejectment was tried in the circuit court of the United States for the district of West Virginia, against M. B. Mullins et al., defendants, in which the validity of the title of this complainant was put in issue, and in which, under the instructions of the court that the complainant had no right to recover the possession of the said land (this tract of 500,000 acres), or any part thereof, the jury found for the defendants. Thereupon McDonald and the other defendants, whose names are in these proceedings, and who were under the temporary injunction, filed a statement in the equity suits in which they were defendants, in the nature of a plea, bringing this verdict to the attention of the court; whereupon the court dissolved the temporary injunction. The complainant appealed to this court, having entered into a supersedeas bond, and the action of the court below was affirmed. *King v. Williamson*, 42 U. S. App. 395 et seq., 25 C. C. A. 355, and 80 Fed. 170; *Same v. McDonald*, 42 U. S. App. 397, 26 C. C. A. 685, and 80 Fed. 1006; *Same v. White*, 42 U. S. App. 398, 26 C. C. A. 685, and 80 Fed. 1006. In the meantime, the case of *King v. Mullins* was carried by writ of error to the supreme court of the United States (18 Sup. Ct. 925); and, upon the rendition of the decision of this court in the *King v. Williamson* cases, they were carried by certiorari also into the supreme court; and the mandates of this court were stayed. These cases, at the hearing of the present appeal, were still pending. Afterwards the complainant filed this bill. In it, after setting out in substance what has been briefly stated above, he charges that the defendants, notwithstanding the existence of the restraining order of the court, have entered upon the lands claimed by him, and have cut down great quantities of timber thereon, and have put this timber in the Guyandotte river and its tributaries, for the purpose of removing it from the district of West Virginia; and that these acts were done notwithstanding the

service upon each of them of notices of the reinstatement of the injunctions, and of their binding force upon them; and that, when this proved unavailing, he applied for and obtained from the court rules against them to show cause why they be not attached for contempt; that, in serving these notices, the officer charged with the service was put in great jeopardy of life and limb, and was assaulted and threatened. The bill further charges that the other defendants are purchasers of timber, who have bought from the trespassing defendants with full notice of the injunction, and that they are actually removing it. The bill prays discovery as to the amount of timber cut and removed, the appointment of a receiver to take charge of it pending these proceedings, and an injunction against the cutting and removing any more timber from this land, with the further prayer that the timber already cut be adjudged the property of the complainant, and to this end that an account be taken.

Upon the filing of the bill, the court below issued a rule against the defendants to show cause why an injunction be not granted as prayed for in the bill, and meanwhile issued its restraining order, in these words:

"And it appearing from the allegations of said bill that said defendants have cut, or caused to be cut, certain timber upon said tract of land, a large part of which is charged to have been cut in violation of former orders of this court, and that the same is now lying in Guyandotte river, in imminent danger of being removed out of the state of West Virginia, and beyond the jurisdiction of this court; and it appearing that the said timber, unless properly cared for and preserved, is in danger of being removed, lost, or scattered, and that there is danger of injury to complainant from delay pending the hearing upon said rule,—It is further ordered and decreed that in the meantime, and until the further order of the court, the defendants, and each of them, their servants and agents, and all persons claiming or acting under them, or any of them, be, and they are and each of them is hereby, inhibited and enjoined from cutting timber upon said land, and from removing and disposing of any of the said timber heretofore cut upon said land; and that Joseph Ruffner be, and he is hereby, appointed a receiver of said timber, and authorized and empowered to take possession of and preserve said timber until the further order of the court herein; and the said receiver is directed and required to take and report an account thereof, with all the information he can obtain in relation thereto; and the said defendants and all other persons are enjoined and restrained from interfering in any manner whatever with said timber, or with said receiver's possession thereof. No bond is required at the present time upon the awarding of the temporary injunction herein, nor is any bond at present required of said receiver."

The bill was subsequently amended by averments meeting certain claims of title on the part of the defendants, traversing and denying the effect thereof. And, defendants having alleged that the lands claimed by complainant had been forfeited under the laws of West Virginia, the amended bill charges that these laws, in so far as they were construed to work such forfeiture, are in contravention of the constitution of the United States.

The defendants filed their answers to the bill of complaint, original and as amended. The answers set up long, continuous, notorious, adverse possession by defendants, or those under whom they claim, under color of title, and that the title of complainant has been forfeited. A motion was made in their behalf to dissolve

the restraining order, on the bill, the amendment, affidavits, and the answers, on hearing which the court entered this order:

"Upon consideration of said motion to dissolve the injunction and discharge the receiver, the court is of opinion that as it appears from the evidence in this cause that an injunction had heretofore been awarded, which injunction is now in force, pending an appeal in the supreme court of the United States, inhibiting and restraining the defendants from cutting the timber described in the plaintiffs' bill now under consideration, that the cutting of the timber was a violation of the injunction pending in the said supreme court, and for this reason refuses to turn over and surrender the timber to the defendants in this action, and also declines to discharge the receiver, it being the opinion of the court that it is its duty to preserve the status of the property pending the litigation, until the supreme court shall have finally disposed of the question before it. But the court is further of the opinion that inasmuch as the timber has been cut and severed from the property claimed by the plaintiffs in this action, in violation of the first injunction awarded against the defendants, it is the duty of the court to hold the property, and either direct the receiver to sell it or to permit the defendants to give bond in such amount as will indemnify the plaintiffs in this action, so that they may take possession of the property,—to answer the judgment of the court whenever, by its decree, they are required to do so. It is further ordered, adjudged, and decreed that the defendants have leave to take possession of the property, upon filing with the receiver a bond in sufficient penalty to observe the decree of the court in the event they are required to do so, to be returned by him to this court, which will cover the value of the property now in his hands; and in the event that the defendants decline or fail to give the bond within ten days, or such further time as upon application the court may give, then, upon the failure of the defendants to give such bond, the receiver is directed to sell the logs in his possession as such receiver, either at private or public sale, as he may think best for the interest of all concerned; but, if the property is sold at public sale, he must first advertise it for a period of ten days in the *Huntington Advertiser*, and report his proceedings to the court. But, before executing this sale, he must enter into bond in the sum of five thousand dollars, conditioned for the faithful discharge of his duties as such receiver."

Thereupon leave was granted to defendants to appeal to this court, and the cause is here on six assignments of error. The first three of these go to the title of the complainant in the land, and in the timber mentioned in the bill, denying this title altogether. The remaining three assignments charge error in the granting of the injunction, in appointing the receiver, in refusing to dissolve the injunction, in not delivering the timber to the defendants, in taking it out of their possession, and in putting it into the hands of the receiver.

At the threshold we are met by a motion to dismiss the appeal, upon the ground that this case is one which involves the construction of the constitution of the United States, and in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States. There can be no doubt that when the only question in the case, or when the controlling question in the case, involves the construction or the application of the constitution of the United States, then the supreme court has exclusive appellate jurisdiction, and an appeal will not lie to the circuit court of appeals. And if, besides these, there are other questions (not controlling questions, however), the supreme court, by virtue of its jurisdiction over the controlling question, will

take jurisdiction of, and will decide, the whole case. *Horner v. U. S.*, 143 U. S., at page 576, 12 Sup. Ct. 522. There is also no doubt that no appeal from the granting or the refusal of an injunction can be carried to the circuit court of appeals, except in a cause "in which an appeal may be taken from a final decree to the circuit court of appeals." 26 Stat. 826. The cases which can go only to the supreme court are those in which the construction or application of the constitution is the controlling question; that is to say, in which no proper conclusion can be reached without deciding it. *Carey v. Railway Co.*, 150 U. S. 170, 14 Sup. Ct. 63. The case at bar is not such a case. The court below might well hold, admitting, for the sake of argument, that the provision of the constitution and laws of West Virginia could not work a forfeiture of the lands of complainant simply for nonpayment of taxes, or from failure to put them on the tax list for five years. But it may also be held that the long, continuous, notorious, adverse possession of the defendants, and of those under whom they claim, has secured for them an impregnable title. Such a conclusion would be decisive, and yet would not involve or in any way require the construction or application of the constitution of the United States. This motion is dismissed.

If the questions presented in this appeal came before this court on their merits, there would be strong reasons to sustain the appeal. The complainant stands upon a grant for half a million of acres, covering lands in three states, over 100 years old, under which no possession or use has been shown. He is met by affidavits which tend to show that these defendants have been and are in actual possession and use for very many years, some of them holding lands on which they and their immediate ancestors have been born and bred. It is a very grave exercise of power to extend the strong arm of this court, invade this long uninterrupted possession, take control of the land, and forbid the use of the property by those in possession. But, be this as it may, the case does not come up in this way. The defendants were enjoined by the order of the circuit court from doing the very thing they are now charged with doing, after the knowledge of and in despite of the injunction. This injunction was dissolved by the action of the court which granted it. The complainant, exercising an unquestionable right, appealed from the decree dissolving the injunction, and suspended its operation by giving a supersedeas bond.

The question we are called upon to decide is, did the supersedeas bond restore vitality to the injunction which the circuit court dissolved? A "supersedeas," properly so called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from, or, if an execution has been issued, it prohibits further proceedings under it. *Hovey v. McDonald*, 109 U. S. 159, 3 Sup. Ct. 136. When an injunction has been dissolved, it cannot be revived except by a new exercise of judicial power, and no appeal by the dissatisfied party can revive it. *Knox Co. v. Harshman*, 132 U. S., at pages 16, 17, 10 Sup. Ct. 8. And this lan-

guage is broad enough to include an appeal with a supersedeas. In *Hovey v. McDonald*, *supra*, the distinction is stated:

"The truth is that the case is not governed by the ordinary rules that relate to supersedeas of execution, but by those principles and rules which relate to chancery proceedings exclusively. * * * In this country the matter is usually regulated by statutes or rules of court, and generally an appeal, upon giving the security required by law (when security is required), suspends further proceedings, and operates as a supersedeas of execution. * * * But the decree itself, without further proceedings, may have an intrinsic effect, which can only be suspended by an affirmative order, either by the court which makes the decree or by the appellate tribunal. This court, in the *Slaughter-House Cases*, 10 Wall. 273, decided that an appeal from a decree granting, refusing, or dissolving an injunction does not disturb its operative effect. Mr. Justice Clifford, delivering the opinion of the court, says: 'It is quite certain that neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in this court.' It was decided that neither a decree for an injunction, nor a decree dissolving an injunction, was suspended in its effect by the writ of error, although all the requisites for a supersedeas were complied with. It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the status quo until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered."

But this, it is added, is wholly discretionary; and the exercise of the power is not an appealable matter. This case is affirmed in *Knox Co. v. Harshman*, 132 U. S. 16, 10 Sup. Ct. 8. Equity rule 93 was passed in accordance with this principle.

It is not necessary to inquire how far the proviso to the act of 18th February, 1895 (2 Supp. Rev. St. p. 376), modifies this doctrine; for, in the case of *King v. McDonald*, the court below, permitting an appeal with a supersedeas bond, in terms suspends the decree below: "That a transcript of the record of said cause be transmitted to said court of appeals, and that, pending such appeal, the said decree of June 18, 1896, so far as the same dissolves said injunction, be wholly superseded and suspended." Record in *King v. McDonald* (case 190 in this court) 26 C. C. A. 685, 80 Fed. 1006. This being the case, the cause was heard in this court, the supersedeas being in full operation. Our decision sustained the decree below dissolving the injunction; and ordinarily this would have put an end to the supersedeas; but, before the mandate could go to the court below, a writ of certiorari from the supreme court was issued to this court, directing that the record be removed. So, the decree of the circuit court of appeals has not gone into effect. "A writ of certiorari, when its object is not to remove a case before trial, or to supply defects in a record, but to bring up after judgment the proceedings of an inferior court or tribunal whose procedure is not according to the course of the common law, is in the nature of a writ of error." *Harris v. Barber*, 129 U. S. 369, 9 Sup. Ct. 314. The whole case goes up on the certiorari. *Panama R. Co. v. Napier Shipping Co.*, 166 U. S. 280, 17 Sup. Ct. 572. So, the case has gone into the supreme court, just as it came into this court, with an order of the court below suspending the de-

cree dissolving the injunction. This being the case, we are not called upon to determine whether, upon the allegation of title in the bill, and the assertion of paramount title in the answers, a case is made justifying a restraining order. But the real question is whether, in doing the acts complained of in the present bill, the defendants were or were not violating an existing order of injunction of the circuit court. This is the ground upon which the court below granted the restraining order, and it is not alluded to in any of the assignments of error. They allege error upon issues which are properly triable in the action of ejectment. Whatever may be the merits of the points made by the defendants, and however strong their title, they cannot be justified in asserting their rights in the face of an order of injunction of the court.

Reviewing the record as it appears here, the court below should have required, from the receiver, bond with surety for the proper discharge of his duties as such receiver, and also the court should have required an injunction bond from complainant. It is ordered and decreed that the appeal be dismissed. It is further ordered that the cause be remanded to the circuit court, with instructions to require the receiver to enter into bond, with surety, to be approved by any judge of the circuit court, in a penal sum double the value of the property in his hands as receiver, and with a condition for the faithful performance of his trust; and also that the complainant be required to enter into an injunction bond, with like surety, to be in like manner approved, in the penal sum of \$10,000; this security to be furnished and approved within 30 days after the mandate of this court is filed in the court below. Upon failure to comply with this order, the injunction will be dissolved.

BALTIMORE BUILDING & LOAN ASS'N et al. v. ALDERSON.

(Circuit Court of Appeals, Fourth Circuit. November 1, 1898.)

No. 269.

1. JURISDICTION OF FEDERAL COURTS—APPOINTMENT OF RECEIVER FOR PROPERTY OUTSIDE OF DISTRICT.

A resident and citizen of Maryland, who was a stockholder in a West Virginia corporation, brought a suit in the federal court in West Virginia against the corporation for the appointment of a receiver for its property, which was situated in Maryland, with authority to complete and furnish an unfinished hotel building thereon, and to issue receiver's certificates therefor. Lienholders who were citizens of Maryland were made defendants, but in an amended bill only the corporation was named as defendant. A receiver was appointed, who completed the building, issuing receiver's certificates for the cost. The Maryland lienholders, on their application, were permitted to become parties and to prove their liens. Under a subsequent order the property was sold, and an order distributing the proceeds made, which gave the receiver's certificates priority. *Held*, that the lienholders were necessary parties to the suit, and being citizens of the same state as complainant, and the property being situated outside of its district, the court was without jurisdiction, and the entire proceedings were coram non iudice and void.

B. CORPORATIONS—POWERS OF COURT OVER PROPERTY—RECEIVER'S CERTIFICATES.

A court cannot authorize the issuance of receiver's certificates for the purpose of improving or adding to the property of a private corporation, or of carrying on its business, without the consent of creditors whose liens would be affected thereby.

Appeal from the Circuit Court of the United States for the District of West Virginia.

This was a suit in equity by Joseph C. Alderson, a stockholder, against the Loch Lynn Heights Hotel Company and others, for the appointment of a receiver, and other relief. From orders confirming a sale of the property, and distributing the proceeds, the Baltimore Building & Loan Association and others, lienholders, appeal.

Fielder C. Slingluff and J. G. McCluer (Dave D. Johnson, on brief), for appellants.

Henry M. Russell (J. G. Sommerville, on brief), for appellee.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. This is an appeal from decrees of the circuit court of the United States for the district of West Virginia. The case is complicated, and a full statement is necessary.

The original bill was filed on 3d June, 1895, by Joseph C. Alderson, a citizen and resident of the state of Maryland, a stockholder in the Loch Lynn Heights Hotel Company, against the Loch Lynn Heights Hotel Company, a corporation of the state of West Virginia; William F. Williams, administrator of Enos R. Williams, a citizen and resident of the state of New Jersey; W. S. Boody, Joseph H. Henry, also citizens of New Jersey; P. T. Garthright, C. M. Rathbun, John A. Wolf, G. A. Shirer, William C. Sisk, Frank H. Thrasher, citizens of the state of Maryland; William Rulifson and ——— Culkins, citizens of the state of New York; George M. Whitescarver, William A. Wilson, J. B. Sommerville, John T. McGraw, and Louis Walters, citizens of West Virginia; the Mountain Home Company, a corporation of West Virginia; and the Baltimore Building & Loan Association, a corporation of the state of Maryland. The bill stated: That the defendant the Loch Lynn Heights Hotel Company, having purchased a tract of land of 1.128 acres in Garrett county, in the state of Maryland, had entered into a contract with Enos R. Williams on the ——— day of ———, 1894, to erect an hotel building thereon. That, shortly after he made the contract, Enos Williams took with him into co-partnership W. S. Boody and William F. Williams, and that the corporation recognized the firm as the contractors. On 16th March, 1895, the Mountain Home Company conveyed two tracts of land adjacent to that on which the hotel was in course of erection to the Loch Lynn Heights Hotel Company,—one of 2.01 acres, and the other of 12½ acres. The first was for no money consideration, but for certain advantages to the grantor. The second was for the sum of \$2,733.33, represented by a note not yet paid. On the 18th March, 1895, the Loch Lynn Heights Hotel Company executed to the Baltimore Building & Loan Association a mortgage

of all its property for the sum of \$10,000, then borrowed from the association. This sum is still unpaid. That this money was paid to the contractors. That, Enos Williams having died, the surviving partners first undertook to finish the contract, but soon abandoned it and the work, and left the state of Maryland, with many debts behind them for work and labor done on the hotel. That the hotel being unfinished, although some \$20,200 had been paid thereon, the subcontractors filed mechanics' liens against the hotel,—in the aggregate, \$5,040.84. These contractors are named, and are parties to the bill. That complainant is not only a stockholder, but also a creditor of the company. That a contract had been entered into for leasing the hotel to Mrs. Lillie B. C. List for three years, the company to furnish it, and that it was important to furnish the hotel and fulfill this contract of lease. Whereupon the bill prays that a receiver be appointed to take charge of the property, with authority to borrow money and complete and furnish it; with authority, also, to lease it; with further authority to borrow money on receiver's certificates to pay insurance on the hotel and its furniture, and to pay the interest, dues, and other charges of the Baltimore Building & Loan Association,—praying also that an account be taken of all outstanding debts of the hotel company. Upon filing the bill, one J. B. Sommerville was appointed the receiver, with all the authority, as to completing and furnishing the hotel, borrowing money, and issuing receiver's certificates, asked for in the bill. Subpœna ad respondendum was issued, and service was accepted 10th June, 1895, thereon, for C. M. Rathbun, William C. Sisk, Frank H. Thrasher, and the Baltimore Building & Loan Association,—all citizens of the state of Maryland. On 13th June, 1895, the receivership was made permanent. On 17th July, 1895, the defendants, who were served as above, entered special appearance, and moved to quash the return to the subpœna on the ground that they were not citizens or residents of the state of West Virginia, and the returns of the writ in Maryland could not be adopted by the marshal of the district of West Virginia. The record does not disclose any action of the court on this motion, nor is there any order of discontinuance as to these defendants. But on 14th October, 1895, an amended bill is filed by the complainant, in which only the Loch Lynn Heights Hotel Company is made the party defendant, no other names having been mentioned. On the same day the receiver filed his report of his transactions as receiver, carrying out the instructions of the court, and exercising the powers conferred on him, especially in the matter of making contracts for completing and furnishing the hotel, and of issuing receiver's certificates therefor, of which he had already issued certificates for over \$9,000.

Just here arises a grave question of jurisdiction. It goes without saying that the original bill, on its face, shows that the court had no jurisdiction. A citizen of Maryland brings the bill, and citizens of Maryland are among the defendants. *Peper v. Fordyce*, 119 U. S. 469, 7 Sup. Ct. 287; *Godfrey v. Terry*, 97 U. S. 175; *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303. It is true that if the defendants who are citizens of the same state as complainant are not in-

dispensable parties, so that a decree can be made without necessarily affecting them, the objection can be obviated by dismissing the bill as to them. *Horn v. Lockart*, 17 Wall., at page 579. But the purpose and scope of this bill was to authorize the expenditure of money in completing and furnishing the hotel, paying therefor in receiver's certificates, and thus creating a lien prior to all other liens. In such a decree the defendants, citizens of Maryland, holders of mechanics' liens, and the Baltimore Building & Loan Association, a citizen of Maryland, holder of a prior mortgage, were essential and indispensable parties, directly and ultimately affected by the proposed decree. In this private corporation their consent was indispensable to the issue of receiver's certificates. *Hanna v. Trust Co.*, 36 U. S. App. 62, 16 C. C. A. 586, and 70 Fed. 2. So the court had no jurisdiction. We may, however, construe the leave to file the amended bill, in which the names of all the other defendants but the hotel company were left out, as practically dismissing the bill as to them. Has anything occurred since that time in this case giving the court jurisdiction over the whole subject? The amended bill was filed 14th October, 1895. On 28th October, 1895, a general appearance was entered in the name of the Baltimore Building & Loan Association by Thomas J. Peddicord, attorney. On 14th January, 1896, an order of the court was entered:

"This day came William Rulifson and John A. Culkins, partners as Rulifson & Culkins, and the said William Rulifson and John A. Culkins individually, by Thomas J. Peddicord, Esquire, their attorney, and, with leave of the court, filed their petition in this cause, praying that they be made parties herein, and asserting a lien upon certain of the property in the bill mentioned; also came the Baltimore Building & Loan Association, of Baltimore, by the said Thomas J. Peddicord, Esquire, its attorney, and, with leave of the court, filed its petition in this cause, praying that it may be made a party herein, and asserting a lien upon the said property; also came P. T. Garthright, Hanson B. Lewis, A. S. Teats, C. M. Rathbun, John A. Wolf, G. A. Shirer, Pickens Lumber Company, William C. Sisk, Frank H. Thrasher, John A. Connell, and Joseph Henry, by Gilmer S. Hamill, Esquire, their attorney, and filed their petition in this cause, praying to be made parties herein, and respectively asserting liens upon certain of the said property. Thereupon the said William Rulifson, John A. Culkins, the Baltimore Building & Loan Association, P. T. Garthright, Hanson B. Lewis, A. S. Teats, C. M. Rathbun, John A. Wolf, G. A. Shirer, Pickens Lumber Company, William C. Sisk, Frank H. Thrasher, John A. Connell, and Joseph Henry are, on their respective motions, made parties defendant herein, with leave to them respectively to prove their claims before the master hereinafter named."

Following this is an order for the sale of the whole property by the receiver, with directions to a master to take, state, and report an account of the liens upon the property, and the different parties thereof. This order bears the consent in writing of all the defendants named. Thus, these parties, by their action, made themselves parties to these proceedings. On 3d April, 1896, suggestion having been made that the complainant was a citizen of the state of West Virginia, and not of the state of Maryland, the court, hearing the evidence on this point, adjudged that Joseph C. Alderson was when this suit began, and has since remained, a citizen of the state of Maryland. Thus, we have a suit between a citizen of Maryland, complainant, and citizens of Maryland, de-

pendants. The inherent constitutional limitation of the judicial power of the court forbids it to take jurisdiction. This jurisdiction depends upon the constitution of the United States, and the laws passed thereunder. Consent of parties cannot give or create jurisdiction. The *Lucy*, 8 Wall. 309; *Bank v. Calhoun*, 102 U. S. 260. There are cases in which diversity of citizenship is not essential to the jurisdiction,—among these, cases in which the property, the subject-matter of this suit, is already rightfully in the hands of a receiver of the circuit court. *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 201, 11 Sup. Ct. 61; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609; *Bank v. Calhoun*, 102 U. S. 256; *Krippeford v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27. But in this case the order appointing the temporary receiver and the order making the receivership permanent were both made when citizens of the same state were on both sides of the record, and both orders were clearly without the jurisdiction of the court; and, when the order for sale was made, "it could not bind the parties and waive previous errors" (*Railroad Co. v. Ketchum*, 101 U. S. 298), for that same order made parties defendant citizens of the same state as the complainant.

It is more questionable whether the court in this case could put its receiver in control of realty situate in another district. It is true that, from well-settled principles, the jurisdiction of a court of equity may be upheld in disposing of lands in another state whenever the parties or the subject, or such portion of the subject as is within the jurisdiction, are such that an effectual decree can be made and enforced so as to do justice. *Ward v. Arredondo*, 1 Paine, 410, Fed. Cas. No. 17,148. But, to give jurisdiction, either the thing to be acted on, or the person of the defendant, must be within the jurisdiction. *Brown v. McKee*, 1 J. J. Marsh. 474; *Muller v. Dows*, 94 U. S. 444. Courts of chancery doubtless have power to compel persons subject to their jurisdiction to execute conveyances of property located in a foreign state, which will generally be respected by the courts of the latter sovereignty, if executed in conformity with its laws. *Phelps v. McDonald*, 99 U. S. 298; *Miller v. Sherry*, 2 Wall. 237; *Watkins v. Holman's Lessee*, 16 Pet. 25; *Mitchell v. Bunch*, 2 Paige, 606. By means of such orders, and conveyances made thereunder, a court may be able to vest its receiver with the title to realty situate in a foreign jurisdiction. But an order appointing a receiver of realty has no extraterritorial operation, and cannot affect the title to real property which is located beyond the jurisdiction of the court by which the order was made. See *Schindelholz v. Cullum*, 5 C. C. A. 301, 55 Fed. 885, and 12 U. S. App. 242. See, also, *Booth v. Clark*, 17 How. 322. In the case before us a receiver was appointed solely to take charge of and manage realty in another district, notwithstanding the fact that certain indispensable parties were not within the jurisdiction of the court. An order for sale of the same realty was made; the property not being within the jurisdiction, and the parties not being legally present. The suit was of a local nature; its object being, as stated in the original bill, to have a receiver appointed

to take charge of an hotel in Maryland, with authority to borrow money on receiver's certificates to complete and furnish it, and then to lease it to a tenant. The amended bill, filed after the issue of the receiver's certificates, states its object to be the continuance of the possession and charge of the hotel property by the receiver until the sale asked for was had. The whole proceeding was *coram non judice*. The receiver was authorized to incumber property, outside of the judicial district of the court which appointed him, with debts declared to be prior to the vested liens; the holders of these liens not consenting, and not being within the jurisdiction of the court. In 3 Pom. Eq. Jur. § 1318, it is said:

"Where the suit is strictly local, the subject-matter specific property, and the relief, when granted, such that it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated." *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How. 233, 242.

But if it be assumed, for the sake of argument, that the amended bill cured all objection to the jurisdiction; that the court, then having before it the defendant corporation only, and so in control of the corporation, could act on its property outside of the district; that, when the defendants came in and asked to be made parties, their application operated only as an intervention for the purpose of proving their claims; that the jurisdiction of the court can thus be maintained, notwithstanding the citizenship of the parties (*Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, *supra*; *Heidritter v. Oil-Cloth Co.*, 112 U. S. 304, 5 Sup. Ct. 135; *Phelps v. Oaks*, 117 U. S. 236, 6 Sup. Ct. 714; *Krippendorf v. Hyde*, *supra*),—the question then arises as to the priority in lien of the receiver's certificates over all the other liens. The *Loch Lynn Heights Hotel Company* is a private corporation, in no wise of a public or quasi public character,—a purely private concern. The bill is filed by a stockholder, who is also a simple-contract creditor. Because of the peculiar nature of the duties of a railroad corporation,—especially of the interest which the public has in keeping it a going concern,—receiver's certificates are sanctioned in railroad receiverships. The power of the court to issue them has been established beyond question. *Wallace v. Loomis*, 97 U. S. 162; *Fosdick v. Schall*, 99 U. S. 254; *Mercantile Trust Co. v. Kanawha & O. Ry. Co.*, 7 C. C. A. 3, 58 Fed. 6. But the principles upon which this doctrine rests have no application whatever to private enterprises which owe no duty to the public. In the case of private corporations the court cannot authorize the issue of receiver's certificates for the purpose of improving, adding to, or carrying on the business of the company, without first having the consent of creditors whose liens would be affected thereby. *Farmers' Loan & Trust Co. v. Grape Creek Coal Co.*, 50 Fed. 481. In *Raht v. Attrill*, 106 N. Y. 423, 13 N. E. 282, the precise question which is now under discussion came up and was decided. An hotel company mortgaged its property to raise funds to build an hotel. Before completion, the corporation became insolvent, and upon the application of its principal stockholders a receiver was appointed; and upon an applica-

tion and showing that the wages of the men who worked on the hotel building were unpaid, and they threatened, unless paid, to burn the building, the court made an order authorizing the receiver to issue certificates, which were declared to be a lien prior to the first mortgage, to raise funds to pay the wages of the laborers. After an exhaustive discussion, the court held that these certificates, issued without the consent of the prior lienholders, did not displace their lien. The same question came before the circuit court of appeals of the Eighth circuit in *Hanna v. Trust Co.*, 36 U. S. App. 62, 16 C. C. A. 586, and 70 Fed. 2, and the same conclusion was emphasized and enforced. See, also, *Hooper v. Trust Co.*, 81 Md. 559, 32 Atl. 505. From this point of view, the mortgage held by the Baltimore Building & Loan Association, and the lien of the holders of the mechanics' liens, are not subject to the prior lien of the receiver's certificates. As between the holders of mechanics' liens and the Baltimore Building & Loan Association, it appears from the record that the work and labor secured by the liens were all done on the hotel while the hotel company owned the 1.128 acres, and before the acquisition of the rest of the realty now held by the hotel company. The mortgage of the Baltimore Building & Loan Association covers all the realty, and is, as to all but the 1.128 acres, a prior lien.

We have striven anxiously to find some way in which this appeal could be disposed of without undoing all which has been done with so much expenditure of time, and at such cost. But we have been unable to do so. As has been seen, all the orders and decrees procured were entered in a cause in which the court had no jurisdiction. They were outside of the constitutional limitation of the judicial power of the court. They were void, not voidable. The inevitable result is that they must be vacated. The cause is remanded to the circuit court, with instructions to vacate the order ratifying the sales made by the receiver, and the order distributing the purchase money, and that it direct that the payments made by the purchasers be returned to them; that the decree for sale be set aside, and the bill dismissed. The costs to be paid by the appellee. Reversed.

MERCANTILE TRUST CO. v. COLUMBUS, S. & H. R. CO.

(Circuit Court, S. D. Ohio, E. D. October 24, 1898.)

1. RAILROADS—ABANDONMENT OF TRACK—SPUR TRACK.

Under Rev. St. Ohio, § 3272, providing that a railroad company shall make no change in its road or terminal which will involve the abandonment of the road, either partly or completely constructed, where a company, under its resolution for building a branch line, had a discretion as to the place where it should fix the terminus, and, after building its track to certain mines, established the terminal station a mile or so from the end of such track, that part of the track beyond the station is not a part of its line of road to which the statute applies, but is simply a spur or switch track.

2. SAME—RIGHT TO ABANDON PRIVATE SWITCH TRACK.

Neither a railroad company nor its receiver, in the absence of an express contract, can be compelled to maintain and operate a switch or spur from

its line for the use of private parties in the shipment of their products at a loss, or when its operation cannot be rendered safe without a considerable expenditure of money.

In the Matter of the Intervening Petition of Hill & Hough.

Philip H. Kumler, for interveners Hill et al.

Lawrence Maxwell, Jr., for receiver.

TAFT, Circuit Judge. This is a railroad foreclosure suit. The railroad of the defendant company is being operated by S. M. Felton, receiver, under the orders of this court. The intervening petitioners are the owners of coal-mining property in Clayton township, Perry county, Ohio. They own what is called the Columbus & Eastern mine, and the Davis mines and the Wallace mines, within a mile and a half of Redfield station, on the Buckeye Branch of the Columbus, Sandusky & Hocking Railroad. They own also the mining lands upon which are the Coyle mine and the Simons mine, about two miles distant from Redfield. The petition avers and the evidence shows that the receiver has taken up the track which runs from Redfield by the Columbus & Eastern mine, and proposes to discontinue its use. The amendment to the petition avers that the receiver intends to take up the track running from Redfield to the Coyle mine and the Simons mine. The petition avers that the line from Redfield to the Columbus & Eastern mine is a part of the Buckeye Branch of the Sandusky & Hocking road, and that the receiver is forbidden, by reason of the charter obligations of the company whose road he is operating, to discontinue the use of the track. The petition admits that the line from Redfield to the Coyle mine is only a spur or switch track, and is not a part of the main line of the railroad. The receiver, in his answer, takes issue with the averment of the petition upon the question whether the track from Redfield to the Columbus & Eastern mine is part of the main road, and upon this considerable evidence has been introduced on both sides. The Columbus, Sandusky & Hocking Railroad Company is a consolidation of a number of different railroads. The part of it here in question was constructed by the Columbus & Eastern Railroad Company, which then had a line running from Columbus to and through Fultonham, in Newton township, Muskingum county, Ohio. The stockholders of the railroad, at a meeting duly called, passed the requisite resolution to construct a branch railroad, under section 3280 of the Revised Statutes of Ohio. The resolution was:

"That the company hereby determines to construct a railroad from a point on its main line at or near Fultonham, in Newton township, Muskingum county, Ohio; thence in a southerly course to a point at or near the town of Saltillo, in Perry county, Ohio; being a distance of about ten miles; all of said branch being in the counties of Muskingum and Perry, state of Ohio."

The branch was built to and through Saltillo, and then a track was laid $2\frac{1}{2}$ miles beyond Saltillo, to a point near the Columbus & Eastern mine. Just when this was completed, it does not certainly appear; but it does appear that in November, 1883, the town of Redfield was platted, about one mile from Saltillo, and a little more than a mile from the Columbus & Eastern mine, on the track between them. It

further appears beyond any doubt that the town of Redfield thus laid out became the actual terminus of the Buckeye Branch. There is evidence tending to show that it was the intention to carry the branch by the Columbus & Eastern mine down to Rehoboth. Whether this be true or not, the plan was abandoned. The more probable explanation is that the Rehoboth route was not by the Columbus & Eastern mine, but to the westward of this, up a water course to the southwest. I do not regard it as very material which was the proposed course to Rehoboth, because I have not the slightest doubt that the new town of Redfield was planned to be the terminus of the road until Rehoboth should be reached. The terminus fixed in the certificate was Saltillo, and, while the expression "at or near Saltillo" gave the company some discretion to determine where the actual terminus of the branch should be, the conduct of the company from 1883 to the present day in establishing its station at Redfield, and in its establishing no station for the receipt of passengers or freight at the Columbus & Eastern mine, puts it beyond question that Redfield is the terminus of the road, and that the track built from Redfield to the mine is nothing but a spur or switch track for the accommodation of the mine.

The petitioners rely upon the language of section 3272 of the Revised Statutes of Ohio, which provides that the company may, by resolution of three-fourths of its stockholders, change the line of any part thereof, and either of the proposed termini of its road, but no change shall be made which will involve the abandonment of the road, either partly or completely constructed. Now, the contention is that the road from Redfield to the Columbus & Eastern mine was built as a part of the main branch, and that it was beyond the competency of the company, having built the line, to end this main line at Redfield, 7,000 feet back. The company took no formal action to fix the terminus of the branch at the Columbus & Eastern mine. They reserved a discretion in their certificate to fix the terminus somewhere at or near Saltillo. The question is, how did they exercise that discretion? The mere building of the track did not determine the exercise of that discretion, until they built a station which should be regarded as a terminus. They did fix a station at Redfield. The line beyond that, whatever may have been in the minds of those who built it when it was first constructed, became, by the fixing of the terminus at Redfield, nothing but a spur or switch.

Having established this fact, the question presented is whether a railroad company may discontinue switch or spur tracks built by it for the purpose of bringing business to its road, when the contract under which the spur was built contains no express obligation to continue its operation for a definite time or forever. The contract under which the spur track to the Coyle mine was built is averred in the petition, but I have not been able to find the original or a copy in the evidence. However this may be, the contract, as described in the amendment to the petition, does not contain any express stipulation by the railroad company that it will keep and operate its spur track for any definite time. This brings the case, in my judgment, in respect to both the

Columbus & Eastern mine and the Coyle mine, within the decision of the court of appeals in the case of *Jones v. Newport News & M. V. Co.*, 31 U. S. App. 92, 13 C. C. A. 95, and 65 Fed. 736. In that case the owner of the coal tippie, which was reached by a branch spur or switch from the main line of the railway, brought suit in damages against the railway company for removing the switch. It appeared that the switch was laid by agreement, and that on the faith of the continuance of the switch the owner of the tippie had erected improvements and expended a considerable sum of money. The court held that, in the absence of an express provision in the contract as to the time during which this switch was to be maintained, it was within the discretion of the company and its directors to remove it at any time, and that an obligation assumed by the company not to remove it for a certain number of years might be invalid, as against public policy, for the reason that the railroad company had no right to bind itself by stipulation with any individual which might interfere with the usefulness of the road to the public generally. It seems to me that the case at bar and the case cited are entirely analogous, and therefore that the receiver has the right to discontinue the spur or switch, and to take up the track from either the Columbus & Eastern mine or the Coyle mine to Redfield. Should the mine owner desire to reach the railroad, he may do so by building a spur track of his own. He cannot compel the railroad company, or the receiver exercising its franchises for the time, to continue the operation of a spur or switch track at a loss, or when the operation of it cannot be rendered safe except by the expenditure of a considerable sum of money. Both these circumstances appear to the satisfaction of the court, from the evidence, as the basis for the action of the receiver. The conclusion reached renders it unnecessary to consider whether the contract under which the side tracks were built ran with the land, so as to bind the grantees of the Columbus & Eastern Railroad Company. The injunction prayed is refused, and an order may be entered to this effect.

WESLEY v. EELLS.

(Circuit Court, N. D. Ohio, E. D. November 14, 1898.)

No. 5,734.

1. STATES—BILLS OF CREDIT—REVENUE BOND SCRIP OF SOUTH CAROLINA.

The revenue bond scrip of the state of South Carolina, issued to the amount of \$1,800,000 under the act of March 2, 1872, is in the form of bills receivable of the state, which resemble bank or treasury notes. The act authorizes their issuance in denominations to be determined by the state treasurer and the president of the railroad to which they were issued, and denominations were made as small as \$1. Under the act they bear no interest, and no date of payment is fixed; but the faith and funds of the state were pledged to their ultimate redemption, and a tax levy was provided for, to be applied to their retirement. They were made receivable at all times after their issuance for all dues and taxes to the state, except taxes levied to pay interest on the public debt; and, when so received, the state treasurer was authorized to pay them out again in

satisfaction of any claim against the treasury. *Held*, that they were intended for circulation as money, and constitute bills of credit of the state, within the prohibition of the constitution of the United States, and are therefore void.

2. *SAME.*

Such scrip having been issued for the purpose of taking up the bonds of a railroad upon which the state had become guarantor, the fact that the railroad company is bound to indemnify the state for any loss by reason of its suretyship does not render the scrip an obligation of the railroad company, nor change its character as bills of credit of the state alone.

This was a suit in equity by Edward B. Wesley against Howard P. Eells for the specific enforcement of a contract for the sale of property.

J. M. Shallenbarger and Wm. H. Lyles, for complainant.
A. St. John Newberry, for respondent.

RICKS, District Judge. This is an action to enforce the specific performance of an admitted contract between complainant and defendant for the sale and purchase by them, respectively, of certain property known as "Agricultural Hall," located in the city of Columbia, South Carolina. On December 24, 1890, the state of South Carolina being the owner of said Agricultural Hall property, the general assembly of that state passed an act providing for the sale of said property by the commissioners of the sinking fund of the state of South Carolina. Pursuant to that act, the property was sold at public auction on February 2, 1892, and was bid in by the complainant, by his attorney, for the sum of \$16,165. By the terms of sale the purchaser was required to pay in cash one-third of the purchase price, and to execute his bond and a mortgage of the premises to secure the balance of the purchase price, in two equal annual installments, with interest from the day of sale; the obligor to have the option of paying the whole or any part of the indebtedness so to be secured at any time before its maturity. Complainant caused the deed for the premises to be made to one J. W. Alexander, who consented to act as trustee for him for the purchase of the premises; and the deed was duly executed and delivered by the commissioners of the sinking fund to Alexander, in fee simple, without a declaration of the trust. Alexander executed and delivered to the treasurer of the state of South Carolina his bond, in the penal sum of \$21,553.34, conditioned for the payment of \$10,776.67 in two equal annual installments from the date of the bond, with interest payable annually. It was provided in the bond that Alexander should have the privilege of paying the whole or any part of the amount secured by the bond before maturity. The bond and mortgage and deed of conveyance were dated the 2d of February, 1892,—the day of sale. On the 16th day of February, 1892, complainant, Wesley, being the owner and holder of a large amount of revenue bond scrip of the state of South Carolina, furnished to the said Alexander an amount thereof which at its par value was more than sufficient to cover the amount due the state of South Carolina on said bond and mortgage; and

Alexander, through his attorneys, exercising the power given him by the terms and conditions of his bond to the state, duly tendered to W. T. C. Bates, state treasurer of South Carolina, the full amount due thereon, including interest. Bates had the custody and possession of the bond and mortgage, and was the officer designated by law to receive the amount of the bond and mortgage; he being the obligee named in the bond. The tender was refused. By the laws of South Carolina, a tender in full of the amount of money due to a mortgagee, secured by a mortgage of personal or real property, at any time when the mortgagor has a right to pay the same, operates as a satisfaction and extinguishment of the lien of the mortgage securing the payment of such money, whether the amount so tendered be accepted or not, and whether the mortgagor shall keep himself in position to make good the tender or not. *Salinas v. Ellis*, 26 S. C. 337, 2 S. E. 121. After tender was made by Alexander the state treasurer caused the mortgage given by Alexander to be filed for record in the office of the register of mesne conveyances for Richland county, S. C. The mortgage still stands of record, unsatisfied. On February 15, 1893, Alexander conveyed said Agricultural Hall property to complainant, at his request. In October, 1897, complainant entered into a contract with Howard P. Eells, defendant herein, whereby he agreed to convey said Agricultural Hall property to said Eells, free from any valid lien or incumbrance whatever, at and for the price of \$20,000 in cash. The premises are now, and were at the time of making the contract, of the value of \$20,000. Complainant is ready and willing to deliver to defendant a good and sufficient deed, in law, to convey the said premises to him in fee simple. Defendant refuses to receive said deed and pay the purchase price; contending that the revenue bond scrip tendered by Alexander in payment of the amount due on the bond and mortgage was not a valid obligation of the state of South Carolina, and consequently did not constitute a legal tender for the debt, and did not operate as an extinguishment of the lien of the mortgage. There are no other liens upon said property, except some unentered taxes due the state of South Carolina, which amount complainant is willing that defendant retain out of the purchase price of the premises, when ascertained. It is admitted that if the revenue bond scrip tendered by Alexander was valid, and receivable for dues to the state of South Carolina, the lien of the mortgage was extinguished by its tender. But defendant claims that the revenue bond scrip was in its inception invalid and unconstitutional, constituted no claim against the state of South Carolina, and that its tender was a mere nullity.

By an act of the general assembly of South Carolina passed September 15, 1868, entitled "An act to authorize additional aid to the Blue Ridge Railroad Company in South Carolina," the state, by a guaranty indorsed thereon, pledged its faith and funds to the payment of the principal and interest of the bonds to be issued by the railroad company, to the amount of \$4,000,000. The bonds authorized by the act, with the guaranty indorsed, were issued. On March 2, 1872, an act of the general assembly of South Carolina authorizing the issue

of the revenue bond scrip tendered in payment of the mortgage given by Alexander to the state of South Carolina was passed, and is as follows:

"An act to relieve the state of South Carolina of all liability for its guaranty of the bonds of the Blue Ridge Railroad Company, by providing for the securing and destruction of the same.

"Whereas the state of South Carolina has, by and in pursuance of the provisions of an act approved the fifteenth day of September, A. D. 1868, entitled 'An act to authorize additional aid to the Blue Ridge Railroad Company, in South Carolina,' endorsed a guaranty of the faith and credit of the state on four millions of dollars of bonds, issued by the said Blue Ridge Railroad Company, comprehending the Blue Ridge Railroad Company, in South Carolina; the Blue Ridge Railroad Company, in Georgia; the Tennessee River Railroad Company, in North Carolina; the Knoxville and Charleston Railroad Company, in Tennessee, and the Pendleton Railroad Company, in South Carolina, for the purpose of aiding the speedy completion of the said railroad, which bonds are liable for the debts of the said railroad companies; and whereas the present condition of the finances of the state, and of said companies, is such as to make the further continuance of said bonds on the market inexpedient and unadvisable, and a serious injury and prejudice to the credit of the state; and whereas the existence of the said four millions of dollars of bonds, so guaranteed, creates a large liability upon the part of the state, which the treasurer may be required to meet at unforeseen and inopportune times; and whereas the liability of the state, on account of such guaranty, should be faithfully met and discharged; therefore, in order to secure the recovery and destruction of the bonds and coupons of the said company, issued under and in pursuance of the provisions of the aforesaid act, now pledged in the city of New York and elsewhere, and to relieve the state of all liabilities whatsoever, by reason of its endorsement and guaranty of said bonds:

"Section 1. Be it enacted by the senate and house of representatives of the state of South Carolina, now met and sitting in general assembly, and by the authority of the same, that the state treasurer is hereby directed, with the consent, in writing, of the president of the Blue Ridge Railroad Company, in South Carolina, to require the financial agent of the state, in the city of New York, immediately to deliver to the state treasurer all the bonds of the Blue Ridge Railroad Company, endorsed and guaranteed by the state of South Carolina, which are now in his possession, and held by him as collateral security, for advances made by the said financial agent, by the order of the financial board of the Blue Ridge Railroad Company; and upon the delivery of said bonds, the treasurer is hereby required to cancel the same, in the manner hereinafter directed; and the said Blue Ridge Railroad Company shall thereupon be discharged from all liability to the state on account of such advances.

"Sec. 2. That upon the surrender by the said company to the state treasury of the balance of the said four millions of dollars of bonds, issued by the said Blue Ridge Railroad Company, and guaranteed by the state, the state treasurer is hereby authorized and required to deliver to the president of the Blue Ridge Railroad Company, in South Carolina, treasury certificates of indebtedness (styled revenue bond scrip) to the amount of one million eight hundred thousand dollars, the said certificates to be executed in the manner hereinafter directed; and if the said company shall not be able to deliver all of said bonds at one time, the treasurer is authorized and required to deliver to the said president such amount of such treasury certificates as shall be proportioned to the amount of bonds delivered.

"Sec. 3. That, to carry out the purposes of this act, the state treasurer is hereby authorized and required to have printed, or engraved on steel, as soon as practicable, treasury certificates of indebtedness, to be known and designated as revenue bond scrip of the state of South Carolina, in such form, and of such denomination as may be determined on by the state treasurer and the president of the Blue Ridge Railroad Company, in South Carolina to

the amount of one million eight hundred thousand dollars; which revenue bond scrip shall be signed by the state treasurer, and shall express that the sum mentioned therein is due by the state of South Carolina to the bearer thereof, and that the same will be received in payment of taxes and all other dues to the state, except special tax levied to pay interest on the public debt.

"Sec. 4. That the faith and funds of the state are hereby pledged for the ultimate redemption of said revenue bond scrip, and the county treasurers are hereby required to receive the same in payment of all taxes levied by the state, except in payment of special tax levied to pay interest on the public debt; and the state treasurer and all other public officers are hereby required to receive the same in payment of all dues to the state; and, still further to provide for the redemption of said revenue bond scrip, an annual tax of three mills on the dollar, in addition to all other taxes, on the assessed value of all taxable property in the state, is hereby levied, to be collected in the same manner, and at the same time, as may be provided by law for the levy and collection of the regular annual taxes of the state; and the state treasurer is hereby required to retire at the end of each year from their date, one-fourth of the amount of the treasurer's scrip hereby authorized to be issued, until all of it shall be retired, and to apply to such purpose exclusively the taxes hereby required to be levied.

"Sec. 5. That if any such revenue bond scrip is received in the treasury for the payment of taxes, the treasurer be, and he is hereby, authorized to pay out such revenue bond scrip in satisfaction of any claims against the treasury, except for interest that may be due on the public debt.

"Sec. 6. That upon the delivery to the state treasurer of the said guaranteed bonds of the Blue Ridge Railroad Company, or of any part of them, the treasurer is hereby required to cause the same to be cancelled and destroyed, in the presence of the president of the Blue Ridge Railroad Company, in South Carolina, and in the presence of a joint committee of the senate and house of representatives of this state, to be for that purpose appointed.

"Sec. 7. That whenever the whole number of the said guaranteed bonds shall have been delivered to the treasurer and cancelled, as required by the provisions of this act, the lien of the state of South Carolina upon the estate, property and funds of the said Blue Ridge Railroad Company, in this state, and of the other associated companies in the states of Georgia, North Carolina and Tennessee, as secured by the provisions of an act entitled 'An act to authorize additional aid to the Blue Ridge Railroad Company, in South Carolina,' passed on the fifteenth day of September, Anno Domini one thousand eight hundred and sixty-eight, and all other claims or liens which are held by the state against said company or companies, on account of said guaranty, shall, from thence forth, be forever discharged and released; and should the said company be unable, from any cause, to deliver all of said bonds, such liens shall be discharged and released to an extent which shall be proportional to the amount of such bonds actually delivered.

"Sec. 8. That, if the said company shall accept the provisions of this act, it shall be authorized, if the board of directors may desire, to change the corporate name of the company to that of the 'Knoxville & South Carolina Railroad Company,' and shall have power to extend its railroad or to construct branches thereof, to any points or places in this state, with all the powers and privileges with which the said company is now vested by the provisions of its charter; and the said company shall also have power to issue bonds, and to secure the same by a mortgage, to such amount, and in such manner as the board of directors may direct. And all sales of stock in the said Blue Ridge Railroad Company, in South Carolina, and its associate companies, formerly held by the state and sold by the commissioners of the sinking fund, be, and they are hereby, confirmed.

"Sec. 9. That if any person shall forge or counterfeit the treasury scrip hereby authorized to be issued, or shall, directly or indirectly, aid or assist in the forging or counterfeiting of such scrip, or shall issue, or in any manner use any such, forged or counterfeited, he shall, on conviction thereof, be fined in the discretion of the court, and shall be imprisoned in the penitentiary for a term not exceeding ten years."

The revenue bond scrip issued pursuant to this act was of different denominations, varying from \$1 to \$5,000, and was in the form following:

"\$100.00. No. 21. \$100.00.

"Revenue Bond Scrip.

"The State of [palmetto tree] South Carolina.

"Columbia, S. C., March —, 1872.

"Receivable as one hundred dollars in payment of all taxes and dues to the state, except special tax levied to pay interest on public debt.

"Niles G. Parker, State Treasurer.

"One Hundred Dollars.

One Hundred Dollars."

On each side of scrip: "One Hundred Dollars, Act March, 1872."

The exchange contemplated by this act was effected. Individuals holding the guarantied bonds as collateral security for loans of money to the railroad company surrendered them, and accepted in lieu thereof revenue bond scrip, at the lower rate. Complainant, Wesley, advanced the sum of \$344,925 in cash, and with that sum redeemed \$2,902,000 of the said Blue Ridge Railroad bonds, with all their coupons attached, and delivered the same to the treasurer of the state of South Carolina; and the said bonds and attached coupons were mutilated and canceled, in accordance with the provisions of said act. Wesley received from the state treasurer of South Carolina \$1,005,000 of the said revenue bond scrip. After the exchange of guarantied bonds for scrip was made, the legislature of South Carolina passed an act, on March 13, 1872, abolishing the office of state auditor, and vesting his powers in the comptroller general. By an act passed October 22, 1873, the fourth section of the act of March 2, 1872, providing for an annual tax of three mills on the dollar for the redemption of the revenue bond scrip, was repealed. The act also forbade the comptroller general to levy any tax whatever, unless expressly thereafter authorized to do so by statute. On December 22, 1873, an act was passed forbidding any state or county officer to accept payment of taxes in revenue bond scrip, and forbidding the collection of taxes to redeem said revenue bond scrip. The provision in the act of March 2, 1872, that the scrip should be received in payment of dues to the state, has never been repealed.

This South Carolina revenue bond scrip has twice been held to be bills of credit by the supreme court of South Carolina, in the cases of *State v. Comptroller General*, 4 S. C. 185, and *Auditor v. Treasurer*, 4 S. C. 311. To this judgment no holder of the revenue bond scrip was a party, and they are not concluded thereby. *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608. This scrip has also been before the supreme court of the United States three times. The decision in the first two cases was adverse to the holders of the scrip, upon the ground that the actions were suits against the state of South Carolina without its consent, and they were dismissed without prejudice to a new action. *Williams v. Hagood*, 98 U. S. 72; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608. The holding in the other one was in favor of the complainant in this case, the decision being that he

was entitled to the possession of the property which is the subject of this suit. *Tindal v. Wesley*, 167 U. S. 204, 17 Sup. Ct. 770. But the question of the violation of the constitution of the United States or that of the state of South Carolina was not passed upon in either of these cases.

Defendant asserts that the revenue bond scrip of South Carolina was issued in violation of the constitution of South Carolina, which provides (article 9, § 7) that public debts may be contracted for the purpose of defraying extraordinary expenditures; (section 10) that no scrip, certificate, or other evidence of state indebtedness shall be issued, except for the redemption of stock, bonds, or other evidence of indebtedness previously issued; (and section 14) that any debt contracted by the state shall be by loan on state bonds, of amounts not less than \$50 each, on interest, payable within 20 years after the final passage of the law authorizing such debts. He avers that the guaranty of the state of the original bonds of the Blue Ridge Railroad Company was illegal and void, because made in violation of express statutory conditions which were never repealed, and that as a consequence the revenue bond scrip was without consideration, which, appearing on the face of the law itself, deprived the certificates of all validity, in whosoever hands they might be found. Defendant also contends that the revenue bond scrip is void as being in violation of the provision of the constitution of the United States (article 1, § 10) which declares that no state shall emit bills of credit, and that these certificates, on the face of the instrument and the law creating it, appear manifestly designed to circulate as money in the ordinary transactions of business. Are these certificates bills of credit, within the meaning of the United States constitution? In the case of *Poindexter v. Greenhow*, 114 U. S., at page 283, and 5 Sup. Ct., at page 910, the supreme court say:

"The meaning of the term 'bills of credit,' as used in the constitution, has been settled by decisions of this court. By a sound rule of interpretation, it has been construed in the light of the historical circumstances which are known to have led to the adoption of the clause prohibiting their emission by the states, and in view of the great public and private mischiefs experienced during and prior to the period of the War of Independence in consequence of unrestrained issues by the colonial and state governments of paper money based alone upon credit. The definition thus deduced was not founded on the abstract meaning of the words, so as to include everything in the nature of an obligation to pay money, reposing on the public faith, and subject to future redemption, but was limited to those particular forms of evidences of debt which had been so abused to the detriment of both private and public interests. Accordingly, Chief Justice Marshall, in *Craig v. Missouri*, 4 Pet. 410, 432, said that 'bills of credit signify a paper medium intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society.' This definition was made more exact, by merely expressing, however, its implications, in *Briscoe v. Bank*, 11 Pet. 257, 314, where it was said: 'The definition, then, which does include all classes of bills of credit emitted by the colonies or states, is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money.' And again (page 318): 'To constitute a bill of credit, within the constitution, it must be issued by a state, on the faith of the state, and be designed to circulate as money. It must be a paper which circulates on the credit of the state, and is so received and used in the ordinary business of life.' The definition was repeated in *Darrington v. Bank*, 13 How. 12."

A paper, then, which is a bill of credit, has three essentials: (1) It must be issued by a state in its sovereign character; (2) it must contain a pledge of the faith of the state; (3) it must be designed to circulate as money. There can be no serious dispute that the first two requirements are clearly established by the act itself. Section 3 provides for a paper, to be issued by the state treasurer, and signed by him, expressing that the amount named therein is due to the bearer from the state of South Carolina. By section 4 the faith and funds of the state are pledged for its ultimate redemption. It remains to be determined whether this scrip was intended to circulate as money.

The opinion of the supreme court of South Carolina in the case of *State v. Comptroller General*, 4 S. C. 185, and the opinion of Judge Willard, of the supreme court of South Carolina, on circuit, in the cases of *State v. Parker* and *Dupre v. County Treasurers*, Id. 229, which cases were affirmed by the supreme court of South Carolina in *Auditor v. Treasurer*, Id. 311, discuss the question as to whether this scrip was intended to pass as currency or a circulating medium. These opinions make it quite clear that the legislature intended that the scrip should circulate, between the state government and the people, as money. The supreme court of South Carolina, in passing upon the validity of this scrip, speaking through Chief Justice Moses, gives its reasons for holding them to be bills of credit, as follows:

"The argument which holds it valid as a subsisting obligation, and repels the character of a bill of credit, under which it is classed by the respondent, seems to rest upon the fact that it was not designed to circulate as money. The opinion of Mr. Justice Willard in *State v. Parker* and *Dupre v. County Treasurers*, which was brought to our notice in the case before us, and which will be reported with it, is so full and comprehensive on the point as to leave little space for addition or enlargement. It is not because the paper circulates from hand to hand in a community, like money, that it is to be held a bill of credit; nor does the fact of currency so constitute it. A state might well make the coupons attached to its bonds receivable for taxes without subjecting them to the disabilities of bills of credit, as used in the constitution, even although they might readily pass in payment of debts or for the purchase of commodities. The design to create a circulating medium would be wanting. If, however, the intention to create a currency is apparent from the whole scope of the act, the emission is a bill of credit, within the terms of the constitution. To the many indications in the act to show the intended design which have been pointed out in the opinion of Justice Willard, it might be added that the revenue bond scrip could never have been intended or proposed as a state security for investment, because it bore no interest, and its value consisted in the fact of its ready capacity and facility in supplying all articles necessary for use or consumption. Its capacity for circulation, and its easy convertibility, together with its adaptation to immediate and ready use, would cause a demand for it which a state bond, although bearing interest, could not command. It is contended that, as this was a provision to meet a debt of the state, the purpose was to furnish a fund for payment, and not a circulating medium. But cannot the two co-exist? May not the medium of payment be of such a kind and character as to create in itself a circulating medium? It is not the end which the assumption is to accomplish, but the mode and manner designed, and the use contemplated. The state might issue certificates of indebtedness for the redemption of its bonded debt; but if it did so in the form and manner and design proposed by the act of March 2, 1872, would they be less obnoxious to the objection urged against the revenue bond scrip because they were issued to pay or meet a debt? It is not the purpose of the issue which affects the instrument through which it is made, but the characteristics and incidents which attach

to it as a provision and recommendation for a circulating medium." *State v. Comptroller General*, 4 S. C., at page 228.

So much of the opinion of Justice Willard (to which reference is made in the foregoing opinion of the supreme court of South Carolina, and whose reasoning they adopted) as bears upon the question whether this scrip was intended for circulation as money follows:

"There are certain characteristics that tend to adapt a paper expressing a promise to pay money, or representing money value, to become current in the community as money. It must be in a form convenient to pass from hand to hand. It must be based either on the credit of a government, a corporation, or an individual, or an association of individuals, or upon a fund pledged or set apart for its redemption. It must either have undoubted credit, such as arises from its ready convertibility into money value, or it must tend to supply some want, natural or artificial, of the community in which it is intended for circulation. It must be placed upon the community in quantity or volume sufficient to create an adequate interest and motive to secure its currency. And finally it must have a certain denominational character, adjusted to the wants of the community in respect to a circulating medium. An examination of the act in question will disclose a clear intent to clothe the obligations in question with attributes fitting them for general circulation as money. These attributes will be considered in the order just stated: (1) Was it intended that the revenue bond scrip should be issued in a form convenient to pass from hand to hand in ordinary transactions of the community? Section 3 gives to the scrip the form most usual and convenient to serve as paper money, viz. that of the usual bank or treasury note. It is to be printed or engraved on steel, in such form and of such denominations as the state treasurer and the president of the Blue Ridge Railroad Company shall determine. The object of referring this authority as to form and denomination to the treasurer and the president of the railroad company is obvious. The treasurer is, by the act, to receive and pay out this scrip from the treasury as money; and the president of the railroad company is to receive the scrip as the representative of his company, and to realize from its employment; and they are most likely to know what qualities as to form and denomination would have the tendency to give the greatest currency to the scrip at the time of its issue. A certain discretion is left with them for such purpose. While the third section determines what shall be the substantial character of the scrip, as importing a pledge of the public faith and credit, the form of the instrument, as adapting it in external appearance to the common notion of money, is left with those most concerned with its currency. (2) It is to be based, by the terms of the act, on the credit of the state government in its sovereign capacity. (3) The act attempts not only to confer upon it the full credit capable of being conferred by the use of the full faith and credit of the state, but to create an artificial want in the community, tending to give it currency. In the first place, it is made receivable in payment of taxes and all other dues to the state, except the special tax levied to pay interest on the public debt. Section 3. Again, it is provided that, if any such scrip is received in the treasury for the payment of taxes, the treasurer is authorized to pay out the same in satisfaction of any claim against the treasury, except interest that may be due on the public debt. Section 5. These provisions contain two distinct features: The first is a permissive feature, affecting each individual in the community who is a taxpayer, and supplying to him a motive to become a purchaser of the scrip. A more energetic means of creating an interest and motive in the community to deal with the scrip as money could not be afforded, short of making the scrip compulsory payment of all debts, as between individuals. The other feature involves the communication to the scrip of the capacity of performing all the functions of money in all dealings between state and individuals, excepting only the payment of interest on the public debt. This last feature can have no other significance than that of giving currency to the scrip as money. It will be observed, from the language of the fourth section, in which the faith and funds of the state are pledged, that such is not, in terms, that

such scrip shall be redeemed by the payment to the bearer, on presentation, of the amount of money called for by it; but the language is 'that the faith and funds of the state are hereby pledged for the ultimate redemption of said revenue bond scrip.' It is only ultimate redemption, not payment on demand, that is covered by this pledge. What is meant by 'ultimate redemption' is made clear by the succeeding clauses of that section. It is provided that a certain tax shall be annually levied for the redemption of the scrip, and it is also provided that the state treasurer shall 'retire at the end of each year from their date one fourth of the amount of the treasury scrip hereby authorized to be issued, until all of it shall be retired, and to apply to such purpose exclusively the taxes hereby required to be levied.' The effect of these provisions is that the holder of the scrip must not look to payment according to the tenor of his scrip, but must seek a market for its circulation under the influence of the pledge of faith and funds for its ultimate redemption. In other words, an attempt is made to give currency to the issue, notwithstanding the absence of any intention or ability to redeem according to the tenor of the promise, by obtaining a credit with the community for the amount of scrip put in circulation, on the strength of certain special provisions, and a general pledge of the faith and funds of the state for its ultimate redemption. (4) The quantity or volume of the contemplated issue is such as tended to create a strong motive and interest in the community to keep the scrip in circulation as money. The amount (\$1,800,000), as compared with the extent of the commercial transactions of the community on which that amount was intended to be placed, affords the clearest indication of an intention so to affect the interest of the community as to secure its circulation as money. It was to be placed at once in private hands as valid obligations on the part of the state. The various provisions of the act that looked to a distribution among the people preclude the idea that it was intended that the recipients of this large fund should hold it until redemption, or even that it should be kept together in the hands of a limited number of holders. On the contrary, it was clearly intended for dispersion, and the magnitude of the interest in the hands of the first receivers of the scrip was sufficiently large to warrant the assumption that it would become thus diffused throughout the community. (5) As regards its adaptation in respect of denomination, we have already seen that authority was conferred on those most concerned with its circulation to adapt the issue in that respect to the wants of the community. Such a provision shows additional evidence of an intent that the scrip should circulate as money. Considering the act in its entire aspect, as well as its integral parts, it is clear that the legislature intended that the scrip should circulate as money, and that for this reason the provisions of the act authorizing the issue of scrip are in conflict with the prohibitions of the constitution of the United States as to the emission of bills of credit by states."

In the case of *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, it was urged that interest coupons attached to bonds of the state of Virginia were bills of credit. These coupons were payable to bearer, and were receivable, at and after maturity, for all taxes, debts, and demands due the state. The supreme court, after reviewing the definition of bills of credit as established by prior decisions, held these coupons not to be bills of credit. They say:

"It is very plain to us that the coupons in question are not embraced within these terms. They are not bills of credit, in the sense of this constitutional prohibition. They are issued by the state, it is true. They are promises to pay money. Their payment and redemption are based on the credit of the state, but they were not emitted by the state in the sense in which a government emits its treasury notes, or a bank its bank notes—a circulating medium or paper currency—as a substitute for money. And there is nothing on the face of the instruments, nor in their form or nature, nor in the terms of the law which authorized their issue, nor in the circumstances of their creation or use, as shown by the record, on which to found an inference that

these coupons were designed to circulate, in the common transactions of business, as money, nor that in fact they were so used. The only feature relied on to show such a design or to prove such a use is that they are made receivable in payment of taxes and other dues to the state. From this it is argued that they would obtain such a circulation from hand to hand as money as the demand for them, based upon such a quality, would naturally give. But this falls far short of their fitness for general circulation in the community as a representative and substitute for money in the common transactions of business, which is necessary to bring them within the constitutional provision against bills of credit. The notes of the Bank of Arkansas, which were the subject of controversy in *Woodruff v. Trapnall*, 10 How. 190, were by law receivable by the state in payment of all dues to it, and this circumstance was not supposed to make them bills of credit. It is true, however, that in that case it was held they were not so because they were not issued by the state and in its name, although the entire stock of the bank was owned by the state, which furnished the whole capital and was entitled to all the profits. In this case the coupons were issued by the state of Virginia, and in its name, and were obligations based on its credit, and which it had agreed, as one mode of redemption, to receive in payment of all dues to itself in the hands of any holder; but they were not issued as and for money, or with the design to facilitate their circulation as such. It was conferred, as is apparent from all the circumstances of their creation and issue, merely as an assurance, by way of contract with the holder, of the certainty of their due redemption in the ordinary transactions between the state treasury and the taxpayers. They do not become receivable in payment of taxes till they are due, and the design, we are bound to presume, was that they would be paid at maturity. This necessarily excludes the idea that they were intended for circulation at all."

There are certain resemblances and several marked differences between the Virginia coupons, which were held not to be bills of credit, and the South Carolina bond scrip. The coupons and the scrip are alike in that they are obligations and indebtedness of the state. They are receivable by the state treasurer in payment of taxes and other dues to the state, and their redemption is based upon the faith and credit of the state. Their dissimilarity lies in the fact that the coupons are to be paid on a day certain, while the scrip is not payable at any particular time, but is only to be redeemed or retired from year to year. The coupons are receivable in payment of taxes and other dues to the state only at and after maturity, while the scrip may be used for these purposes from the date of its issue. The coupons are paid and retired when received by the state, but the scrip may be reissued from the state treasury, as often as received, in satisfaction of all claims against the state, except for paying interest on the public debt. In deciding the Virginia coupons not to be bills of credit, the supreme court applied certain tests to determine whether they were intended to constitute a paper currency or circulating medium. Apply these tests to the South Carolina bond scrip. The scrip are, on their face, bills receivable of the state of South Carolina. In their form and nature they are like bank and treasury notes. The terms of the law authorizing their issue show that they were intended for circulation between the government and the people as money. By the power given to the state treasurer and the president of the railroad company to fix the amount of the scrip, which power was exercised so as to make the denomination as low as one dollar, by reason of their bearing no interest, by the provision as to the form of the scrip, the great volume of the issue, and the scrip

being noninterest bearing, its circulation was necessary to sustain its value. They could be used for the payment of taxes and other dues to the state from the date of their issue, and before any part of them were required to be redeemed or retired. The reasoning of the supreme court of South Carolina and of Justice Willard, quoted in this opinion, is so full and convincing that the court feels constrained to follow their decision. Looking at the South Carolina bond scrip in the light of these decisions, and the opinion of the supreme court of the United States in the case of *Poindexter v. Greenhow*, it is quite clear that they are bills of credit, within the prohibition of the constitution of the United States. But the complainant urges that the redemption of the revenue bond scrip did not depend solely upon the good faith of the state, because, as between the state and the railroad company, it was in the power of the state to enforce its payment against the railroad company, and that consequently one of the essential elements going to make up the bill of credit is lacking. The case of *Hagood v. Southern*, 117 U. S. 64, 6 Sup. Ct. 608, is cited in support of this contention. The supreme court in that case say:

"As between the railroad company and the state, the former is primarily liable for any debts represented by the revenue bond scrip [the scrip before the court in this case], or for which it is held by others for security, and is bound to indemnify the state against loss on account of its suretyship."

It will be noted that the court does not hold the railroad company in any way remotely liable for the redemption of the scrip as between the holder and the company. The railroad company is a total stranger to the contract, and in no event has the holder of the scrip any recourse to the railroad company in the event of the failure of the state to redeem the scrip. The good faith of the state is the only pledge for the redemption of the scrip. While the act authorizing the issue of the scrip provided a fund for its redemption, to be raised by taxation, yet its payment out of that fund rests upon the faith of the state. *Darrington v. Bank*, 13 How. 12.

The opinion of this court is that the South Carolina bond scrip issued under and in pursuance of the act of March 2, 1872, are bills of credit, within the prohibition of the constitution of the United States, and therefore void. The tender of the scrip by Alexander to the state treasurer of South Carolina was not a valid tender, and did not operate to extinguish the mortgage given by Alexander to the state. The said Agricultural Hall property is still incumbered by the mortgage, and complainant cannot give defendant a clear title to it. Complainant is not entitled to the relief asked in the bill of complaint. The conclusion we have arrived at makes it unnecessary to determine the question of the violation of the constitution of South Carolina in the enactment of the law providing for the issue of the scrip certificates. The bill of complaint is dismissed at complainant's costs.

GRAND TRUNK RY. CO. v. CENTRAL VERMONT R. CO.

(Circuit Court, D. Vermont. October 22, 1898.)

RAILROADS—PREFERRED CLAIMS IN INSOLVENCY—CAR RENTALS.

A claim against a railroad for car rentals or mileage accruing prior to a receivership is not entitled to payment as a preferential debt.

On Intervening Petition to Establish a Preferential Claim.

Fred H. Williams, for petitioner.

Charles M. Wilds and Elmer P. Howe, for petitionees.

WHEELER, District Judge. This cause has now been heard upon the intervening petition of the Boston Live Stock Line Corporation for payment of car mileage by the receivers, which accrued within the time allowed before the receivership, as a preferred claim. All debts are not allowable as such claims, but only those which bear such a relation to the property in custody, by conserving it, as makes them an equitable and just charge upon it, within proper limits, by way of preference over mere indebtedness. The supreme court of the United States said in *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, after reviewing prior cases:

"Tested by the principles asserted in these cases, the claim for car rental that had accrued prior to the receivership cannot be maintained, but should have been disallowed."

In *Pullman's Palace-Car Co. v. American Loan & Trust Co.*, 28 C. C. A. 263, 84 Fed. 18, the circuit court of appeals of the Eighth circuit said:

"Notwithstanding the ingenious and able arguments of counsel for appellant, we are unable to perceive in this case other than an effort to establish as a preferential debt a claim for the stipulated compensation for the use of cars, or, as it is generally called, 'car rental.' Under the authority of *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, this cannot be done."

In *Virginia & A. Coal Co. v. Central Railroad & Banking Co.*, 170 U. S. 355, 18 Sup. Ct. 657, the court said:

"In concluding that the claims of the interveners were entitled to priority out of the surplus earnings which arose during the control of the road by the court, we must not be understood as in any wise detracting from the force of the intimations contained in the recent utterances of this court in the *Kneeland Case*, 136 U. S. 89, 10 Sup. Ct. 950, and the *Thomas Case*, 149 U. S. 95, 13 Sup. Ct. 824, as to the necessity of a court of equity confining itself within very restricted limits in the application of the doctrine that in certain cases a court having a road or fund under its control may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims accruing prior to a receivership."

These decisions and declarations seem to preclude the allowance of these car rentals or mileages as preferred claims in this case.

The petitioner insists that the money arising from the use of the cars was received in trust, and so should be paid in priority. The freight earned is understood, however, to have accrued to, and been collected by, the railroad company for itself, and not for the petitioner, and to have belonged to that company; and the car rentals to have accrued to the petitioner as a mere debt. This would not impress

a trust upon any part of the money as collected for and belonging to the petitioner. Demurrer sustained and petition dismissed, without prejudice to debt.

SAN DIEGO FLUME CO. v. SOUTHER et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1898.)

No. 419.

1. CANCELLATION OF INSTRUMENTS—JURISDICTION OF EQUITY—GROUNDS OF RELIEF.

A court of equity will not entertain a bill for the cancellation of a contract unless it appears therefrom that its interference is necessary to prevent an injury for which there is no complete and adequate remedy at law.

2. EQUITY—DISMISSAL OF BILL—EFFECT ON CROSS BILL.

A cross bill which avers additional facts, and asks affirmative relief, containing in itself all the essentials of an original bill, is not affected by the dismissal of the original bill.

3. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The decisions of state courts as to the powers of irrigation companies under the provisions of the state statutes are binding on the federal courts.

4. IRRIGATION COMPANIES — RIGHTS UNDER LAWS OF CALIFORNIA — RIGHT TO CONTRACT FOR SALE OF WATER.

Under the decisions of the supreme court of California, neither the provision of the constitution declaring that the use of waters of the state appropriated for irrigating purposes is a public use, nor the statute of 1885, authorizing boards of county commissioners, on petition of consumers, to fix the rates to be charged by a company supplying water for such purposes, affects the right of such a company to make valid contracts with its consumers for the furnishing of water where the rates have not been so established. Such irrigation companies are private corporations, and, in the absence of statutory prohibition or regulation, have the same right to contract as individuals.

Appeal from the Circuit Court of the United States for the Southern District of California.

John D. Works and Lewis R. Works, for appellant.

Bicknell, Gibson & Trask and James A. Gibson, for appellees.

Before GILBERT and MORROW, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. C. H. Souther and W. S. Crosby brought this suit against the San Diego Flume Company to cancel a written contract. It was alleged in the bill that the San Diego Flume Company, a corporation engaged in the business of furnishing water for irrigation and other purposes, made two certain contracts with the complainants, to furnish them water for the irrigation of their lands in San Diego county, Cal.; that by each of said contracts the flume company was to furnish 15 inches of water, continuous flow, measured under four-inch pressure; that the first contract was entered into on January 13, 1890, and the second on March 12, 1890; that on or about June 7, 1894, the defendant wrongfully, and without right, diverted from and deprived the complainants of more than one-half

of the water so contracted to be furnished, and since said date, and until December 8, 1894, refused to restore the said portion of said 30 inches of water; that such diversion of said portion of the water contracted for deprived the complainants of water necessary for the irrigation of their said land, and injured and greatly damaged their trees, vines, and crops thereon, to their damage in the sum of \$6,500; that on October 2, 1894, the complainants rescinded the second of said contracts, on account of such refusal to deliver water as contracted for, but that the defendant denies that said contract is or was rescinded, and the complainants fear that, if it is left outstanding, it will cause serious injury to them. The complainants alleged that they had fully complied with the contracts to be kept and performed by them, and prayed that the contract of March 12, 1890, be delivered up by the defendant, to be canceled, and that the complainants recover from the defendant \$2,160 paid as interest on the principal specified in the contract of March 12, 1890, and that they recover the further sum of \$6,500 damages, and their costs. The defendant answered, denying that it wrongfully diverted water, and claimed its right to divert the same under the stipulation of the contract which provided that "if its supply of water be at any time shortened, or its capacity for delivering the same impaired, by the act of God, or willful injury to any part of its system of waterworks, the above-described land, and the lands to which said water may be attached, shall, during the period of such shortage, be entitled to only such water as can be supplied to and for it after the full supply shall be furnished to all cities and towns that are or may be dependent, either in whole or in part, upon such system of waterworks for their supply of water"; that during the time mentioned in the bill, between June 7 and October 2, 1894, the supply of water was materially shortened by drouth and failure of the average rainfall, and they were unable to furnish the full amount of the water contracted for, for that reason. The defendant then filed a cross bill, in which it was alleged that on March 12, 1890, in consideration of \$9,000, to be paid on or before five years from that date, with interest thereon from May 1, 1890, at 6 per cent. per annum, payable annually, and in further consideration of semiannual installments of the sum of \$30 per annum for each miner's inch of water, for three years from May 1, 1890, and \$60 per annum for each inch after May 1, 1893, the San Diego Flume Company granted a water right to 15 inches of water, miner's measure, under a four-inch pressure, to C. H. Souther and William S. Crosby, for the lands which are described in the bill; and that it was further covenanted that the water to be furnished under the contract was intended to form a part of the appurtenances to said land; and that the flume company is bound by the contract to the owners of the land, and to all subsequent owners, to furnish the same; and that the covenants in the contract contained on the part of said Souther and Crosby should run with and bind the lands described. It was further alleged that on January 9, 1891, pursuant to the laws of California, more than 25 taxpayers of the county of San Diego duly petitioned the board of supervisors of said county to fix and establish rates to be charged by the flume company as annual rental for water furnished

and distributed by it to consumers; that due notice was given of said petition, and the hearing thereof, as required by law, and that, upon the hearing of the evidence relating thereto, an ordinance was, on March 9, 1891, duly passed and adopted by said board of supervisors, fixing the annual rental at the sum of \$120 per inch per annum; that thereby the rate agreed upon in the contract was abrogated and set aside, and the said Souther and Crosby became liable to pay the sum of \$120 per inch per annum for the said 15 inches of water mentioned and contracted for in said contract. The cross bill further alleged that the contract had been in all things complied with on the part of the flume company, but that the other parties thereto had not performed their part of said agreement, and there was now due thereon the sum of \$9,000, with interest from May 1, 1894, and interest on the installment of interest falling due March 12, 1895, and the further sum of \$900 annual rental for said 15 inches of water for the six months succeeding December 1, 1894, and that said sums are a lien upon the real estate described in the bill. The prayer of the cross bill is that the contract be held a valid obligation; that the complainant in the cross bill recover from the defendants therein the said sum of \$9,000, with interest, and said sum of \$900 annual rental, together with the costs of the suit, and the amount found due by the court to be declared a lien upon the real estate described in the contract; and that, upon default of payment, the land be sold under a decree of the court to satisfy the same. Upon the pleadings and the issues created testimony was taken, and the cause submitted to the court. A decree was entered dismissing both the bill and the cross bill, upon the ground that, under the laws of California, the San Diego Flume Company could not make a contract with any consumer of water, and that the contracts which were the subject of the suit were void. The complainant in the cross bill appealed from that portion of the decree which dismissed its cross bill, and contends that the court erred in holding that the contract was invalid. The appellees contend that both the bill and the cross bill were rightfully dismissed, not upon the ground that the contract was invalid, but upon the ground that the original bill of complaint stated no facts which would justify the relief prayed for. The question whether there is equity in the original bill is raised for the first time, so far as the record shows, on the appeal to this court. It will be first considered.

The suit was brought to cancel a written instrument. In order to authorize the court to grant the relief prayed for, facts must be alleged which show the necessity for the equitable interference of the court. In this case it is not alleged that the contract was procured by fraud or duress, or that it was entered into by the mistake of either party. No facts are shown in the bill or in the evidence from which it may be inferred that the written contract is a menace to the complainants, or that there is danger that it may be used tortiously or oppressively by the defendant to their injury. In 2 Pom. Eq. Jur. § 914, the principle governing this class of cases is thus stated:

"The doctrine is settled that the exclusive jurisdiction to grant purely equitable remedies, such as cancellation, will not be exercised, and the concurrent jurisdiction to grant pecuniary recoveries does not exist, in any

case where the legal remedy, either affirmative or defensive, which the defrauded party might obtain, would be adequate, certain, and complete."

In *Insurance Co. v. Reals*, 79 N. Y. 202, it was said of the powers of a court of equity:

"Such a court will not interfere to decree the cancellation of a written instrument unless some special circumstance exists establishing the necessity of a resort to equity to prevent an injury which might be irreparable, and which equity alone is able to avert."

Of similar import are the decisions in *Ryerson v. Willis*, 81 N. Y. 277; *Johnson v. Murphy*, 60 Ala. 288; *Insurance Co. v. Bailey*, 13 Wall. 616; *Kimball v. West*, 15 Wall. 377; *Atlantic Delaine Co. v. James*, 94 U. S. 207; *Blake v. Coal Co.*, 22 C. C. A. 430, 76 Fed. 624.

Viewed in the light of the authorities, there was clearly no error in dismissing the complainants' bill. But it does not follow that the cross bill should have been dismissed. It is true that, where the cross bill is merely defensive of the original bill, the dismissal of the latter carries with it the former. But a cross bill which avers additional facts, and seeks affirmative relief,—in other words, a cross bill which contains in itself all the necessary averments of an original bill,—is not affected by the dismissal of the original bill. It remains for disposition as an original suit. 2 Barb. Ch. Prac. 128; *Holgate v. Eaton*, 116 U. S. 33, 6 Sup. Ct. 224; *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594; *Ralls v. Ralls*, 82 Ill. 243; *Wickliffe v. Clay*, 1 Dana, 585; *Lowenstein v. Glidewell*, 5 Dill. 329, Fed. Cas. No. 8,575; *Markell v. Kasson*, 31 Fed. 104.

The cross bill in this case is brought to foreclose a lien upon real estate. It presents a case of equitable cognizance, if the contract which creates the lien is a valid one. It becomes necessary, therefore, to determine whether the circuit court erred in ruling that, under the constitution and statutes of California, a corporation created for the purpose of appropriating waters of the state, and delivering the same for irrigation, is bereft of the power to enter into contracts with the consumers thereof. In article 14, § 1, of the constitution, it is provided as follows:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be provided by law."

In section 2 of the same article is the following:

"The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

In the Civil Code (section 552) it is provided as follows:

"Whenever any corporation organized under the laws of this state furnishes water to irrigate lands which said corporation has sold, the right to the flow and use of said water is and shall remain a perpetual easement to the land so sold, at such rates as may be established by said corporation in pursuance of law. And whenever any person who is cultivating land on the line and within the flow of any ditch owned by such corporation, has been furnished water by it with which to irrigate his land, such person shall be entitled to

the continued use of said water, upon the same terms as those who have purchased their land of the corporation."

In 1885 (St. 1885, pp. 95-98), provision was made by statute authorizing the boards of supervisors of counties to fix and establish water rates upon petition of 25 citizens:

"Until such rates shall be so established (namely, those first established by the board), or after they shall have been abrogated by such board of supervisors as in this act provided, the actual rates established and collected by each of the persons, companies, associations, and corporations now furnishing or that shall hereafter furnish appropriated waters for such rental or distribution to the inhabitants of any of the counties of this state, shall be deemed and accepted as the legal rates thereof." *Id.* p. 97, § 5.

It becomes necessary at the outset to inquire what interpretation has been given to these provisions of the laws of California by the supreme court of that state. If it has become the settled law of the state that such contracts may be made and enforced by water companies and the consumers of water, the federal courts are bound to adopt the construction so established. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10; *Gage v. Pumpelly*, 115 U. S. 454, 6 Sup. Ct. 136; *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121. In *Claiborne Co. v. Brooks*, 111 U. S. 400-410, 4 Sup. Ct. 494, Mr. Justice Bradley said:

"It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess, and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the state."

In the cases of *Irrigation Co. v. Rowell*, 80 Cal. 114, 22 Pac. 53; *Irrigation Co. v. Dunbar*, 80 Cal. 530, 22 Pac. 275; *Flume Co. v. Chase*, 87 Cal. 561, 25 Pac. 756, and 26 Pac. 825; and *Clyne v. Water Co.*, 100 Cal. 310, 34 Pac. 714,—the supreme court of California has recognized the validity of contracts between water companies and consumers. It is urged, however, against the binding force of these decisions, that in none of them was the question of the validity of contracts, such as that involved in this case, expressly raised, considered, or decided, and that in none of them did it appear that the water which was the subject of the controversy had been appropriated under or by virtue of the constitution or laws of the state, or had otherwise become subject to the public use, declared by the constitution and laws of California. To this it may be said that in the case of *Irrigation Co. v. Dunbar* the nature of the corporation, and its appropriation of water rights under state laws, is stated in the opinion of the court as follows:

"The respondent, the plaintiff in the court below, being a corporation engaged in diverting and supplying water for irrigation, entered into a contract with one Roeding, who was then the owner of a certain tract of land, by which the respondent sold to said Roeding, for the sum of \$1,200, a water right for said real estate."

The case of *Flume Co. v. Chase* was one in which the appellant in the present suit was a party, and the contract under consideration in that case was similar to that which is now before this court for con-

sideration. It was sought in that suit to reform a contract for the sale of a water right for irrigation purposes so as to limit the right to be taken thereunder by the defendant. The defendant answered the complaint, and filed a cross complaint, for the purpose of obtaining specific performance of the contract. The court construed the contract, and by its judgment recognized its validity. It is not to be presumed that, in rendering these decisions, the supreme court of California was unmindful of the questions which are expressly raised in the present litigation. "We are bound to presume that, when the question arose in the state court, it was thoroughly considered by that tribunal; that the decision rendered embodied its deliberate judgment thereon." *Cross v. Allen*, 141 U. S. 528-539, 12 Sup. Ct. 71. Nor is it important that in those cases the opinions are silent as to whether or not the companies obtained their water by appropriation of the waters of the state. In the case of *Merrill v. Irrigation Co.*, 112 Cal. 426, 44 Pac. 720, it was held that, when water is set apart and devoted to purposes of sale, rental, or distribution, it is "appropriated" to those uses, and becomes subject to the public use declared by the constitution, without reference to its mode of acquisition. The court said:

"Had there been no allegations as to the objects of the corporation, the fact that it was engaged in the business of conducting and selling water for irrigation from its pipe constructed for that purpose would have been sufficient, under that branch of the case, to raise a presumption of authority so to do, and to impose upon it the legal liabilities arising therefrom."

It is suggested that the ruling of the circuit court finds support in the decision of the supreme court of California in the case of *Price v. Irrigation Co.*, 56 Cal. 431. In that case it was held that every corporation deriving its being from the act of May 14, 1862, "to authorize the incorporation of canal companies and construction of canals," has impressed upon it a public trust,—the duty of furnishing water, if water it has, to all those who come within the class for whose alleged benefit it was created,—and that, if the rights of any consumer were denied, mandamus was the proper remedy. The court in that case said:

"The rates which the defendant may charge have never been fixed in the manner required by law, but defendant has itself fixed the rates, and could not be permitted to refuse water, to one otherwise authorized to receive it, should he offer to pay those rates. It is not necessary to inquire whether, until the rates are fixed in the legal mode, the defendant could be compelled to furnish water to the extent of its capacity free of charge."

It is the clear intimation of the opinion that if the plaintiff in that case had made an express demand for the water, with the offer to pay the rates which had been fixed by the defendant, he would have been entitled to the writ. What is the trend and purport of the decision in that case, and of the other decisions of the supreme court of the state of California to which reference has been made? They are to the effect that, notwithstanding the fact that the constitution declares that the use of waters of the state appropriated for irrigating purposes is a public use, and the further fact that, under the law of 1885, upon the petition of 25 consumers, the commissioners of the county may fix the rates to be charged by the company and paid by

the consumer, nevertheless, until such rates are fixed in pursuance of law, the corporation furnishing the water, and the consumer receiving it, are left free to make such contracts as they may see fit to make, and their agreements will be sustained in the courts. In other words, there is no provision of the laws of the state, and no principle of public policy, which inhibits such contracts. Corporations engaged in the business of furnishing water for irrigation, under the laws of California, whether they acquire the water by appropriation of the waters of the state or otherwise, are private corporations. They are nowhere declared to be public corporations or quasi public. They conduct their business for private gain. For reasons affecting the public welfare, they are given the right of eminent domain, and, in order that the use of the water may be fairly and equitably adjusted to consumers and their rights protected under the constitution, it is provided that in a certain contingency the rate to be paid by the consumer may be fixed in a manner prescribed by law. The use is public only to the extent that the corporation may be compelled to furnish the water, provided it has the capacity to do so, to all who receive and pay for the same, and that the rule of compensation shall be fixed by the law in case the parties cannot agree. Said Mr. Justice Peckham in *Irrigation Dist. v. Bradley*, 164 U. S. 112-158, 17 Sup. Ct. 56:

"The question, what constitutes a public use? has been before the courts in many of the states, and their decisions have not been harmonious; the inclination of some of these courts being towards a narrower and more limited definition of such use than those of others."

It is suggested that a different interpretation of a similar constitutional provision has been adopted by the supreme court of Colorado in the case of *Wheeler v. Irrigating Co.*, 17 Pac. 487. In that case the court had under consideration the constitution of Colorado, which dedicates all unappropriated water in the natural streams in the state "to the use of the people," and vests the ownership thereof "in the public." By the constitution, also, the right to compensation for furnishing water is recognized, and provision is made for a judicial, or quasi judicial, tribunal to fix an equitable maximum charge, where the parties fail to agree. A consumer of water instituted mandamus proceedings to compel a corporation created under the laws of that state to furnish the water for irrigation. The corporation had presented to the consumer for his signature a contract which contained the condition that he buy in advance "the right to receive and use water," paying therefor the sum of \$10 per acre; and also that he further pay annually in advance, on or before the 1st day of May in each year, such reasonable rental per annum, not less than \$1.50 nor more than \$4 per acre, as may be established from year to year by the corporation. The court held the \$10 section illegal, for the reason that the law did not authorize a corporation engaged in furnishing water for irrigation to sell a water right, but charged it with the public duty or trust of furnishing water to consumers upon receiving compensation for the service, since the water was dedicated to the public use, and did not belong to the corporation. This was held in a case in which no contract had been entered into

between the parties to the suit. The purport of the decision was that the corporation had not such title in the water right that it could compel a consumer to buy, and that it could only exact an annual rate for its service in delivering the water. There is no intimation in the language of the opinion, nor does it follow from the decision, that a contract deliberately entered into between the corporation and a consumer would not have been held valid and binding by the court.

The allegation in the cross bill that on January 9, 1891, proceedings were commenced, under the law of 1885, to fix the annual rental which the flume company might exact for water furnished to consumers, and that, in pursuance thereof, the rate was fixed at \$120 per inch per annum, and that the ordinance so established is still in force, was met by the appellees, who answered, denying that the enactment of said ordinance had abrogated or set aside the contract of March 12, 1890, or that they had ever become liable to pay the rate established by the ordinance. It appears from the pleadings and from the evidence that neither of the parties to this suit deemed the rate so fixed by ordinance applicable to them, but continued to recognize the contract of March, 1890, as controlling their dealings, the one with the other. It is evident that the appellees considered the rate established by the contract more advantageous to them than the rate fixed by the ordinance, and that the appellant was content to rely upon the contract. In the cross bill no attempt is made to assert rights under the ordinance. The prayer of the bill is confined to petitions for relief under the contract. The questions whether the contract has been rescinded by the parties thereto, or, if not rescinded, whether damages have been sustained through its breach, are properly cognizable as matters of defense to the cross bill.

The decree dismissing the cross bill will be set aside, and the cause remanded to the circuit court for further proceedings in accordance with the foregoing views.

LESLIE v. BROWN et al.

(Circuit Court of Appeals, Sixth Circuit. November 9, 1898.)

No. 542.

1. INJUNCTION—ENFORCEMENT OF BOND—RIGHTS OF SURETIES.

The court which grants an injunction, and takes an injunction bond to save the defendant from loss caused thereby, may, in an ancillary proceeding, summarily enforce such bond against the sureties; but in such proceeding, at least when the amount of recovery is uncertain, the sureties must have notice and their day in court before the amount of damages is fixed against them.

2. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—ENFORCEMENT OF INJUNCTION BONDS.

A federal court has jurisdiction of an action at law brought on an injunction bond taken by such court as one to enforce a right secured to the plaintiff by the constitution and laws of the United States and arising thereunder.

3. INJUNCTION—JUDGMENT AGAINST SURETIES ON BOND—VALIDITY.

A judgment in an equity suit, in which an injunction had been issued and an injunction bond taken, entered by agreement between the par-

ties, but without notice or process against the sureties, which purported to fix the amount of liability on the injunction bond, is void as against the sureties, and cannot be made the basis of an action at law against them to recover such amount.

In Error to the Circuit Court of the United States for the District of Kentucky.

This suit was begun by filing the following petition:

The plaintiff, James Harvey Leslie, says that at the June term, 1893, of the circuit court of the United States for the district of Kentucky, held at Frankfort, the plaintiff duly recovered against one M. Schamberg judgment for the sum of forty-six hundred and sixty-seven dollars (\$4,667), with interest thereon from the 3d day of February, 1891, and thereafter execution was duly issued upon said judgment, and, while the same was alive and in full force and effect, was placed in the hands of the United States marshal for the district of Kentucky, to do execution thereof; but before the execution thereof, and while the same was alive and in full force and effect, the said M. Schamberg filed in this honorable court at Covington his certain bill of complaint, and therein such proceedings were had as that on the 19th day of August, 1893, an order was therein duly entered enjoining this plaintiff from proceeding further upon his said judgment. Said order is in words and figures as follows, to wit:

"This cause being heard upon the bill and amended bill and the motion of complainant for a restraining order, upon notice to defendants given July 28, 1893, it is ordered that the defendant, James Harvey Leslie, and John B. Leslie, and their agents and servants, and all other persons, are enjoined and restrained, until the further order of the court, from proceeding further against the complainant or his property, under a certain judgment rendered in this court at its June term, held at the city of Frankfort, in a certain action then and there pending, wherein James H. Leslie, the defendant herein, was plaintiff, and the complainant herein, M. Schamberg, was defendant; said judgment being for the sum of forty-six hundred and sixty-seven dollars (\$4,667), with interest. But this order shall not issue until bond shall be executed by the complainant, with surety to be approved by the clerk of the court at Covington, in the sum of eight thousand dollars (\$8,000), conditioned to pay the damages and all injury sustained by the defendant by reason of the injunction, if the order therefor shall have been wrongfully obtained or said injunction be dissolved."

And thereupon the said M. Schamberg, in pursuance of said order, duly executed in said court his certain injunction bond, with the defendants M. H. Houston and George N. Brown as his sureties in the sum of eight thousand dollars (\$8,000), which bond is in words and figures as follows, to wit:

"We undertake that the complainant, Meyer Schamberg, will pay to the defendants James Harvey Leslie and John B. Leslie the damages, not exceeding eight thousand dollars, sustained by them or either of them by reason of the injunction in this cause, if the order therefor entered August 1, 1893, shall have been wrongfully obtained or said injunction be dissolved.

"Witness our hands this August 5, 1893.

M. Schamberg, by

"M. H. Houston, by

"Harvey Myers, his Attorney in Fact.

"George N. Brown, by

"Harvey Myers, his Attorney in Fact.

Jos. C. Finnell, Clerk.

"Approved August 5, 1893.

"Taken and acknowledged before me this 5th day of August, 1893.

"Jos. C. Finnell, Clerk."

Said order was executed upon the marshal, who returned said *fi. fa.* unexecuted.

And thereafter such proceedings were duly had in said cause as that on the 20th day of September, 1894, by judgment entered therein, said injunction was dissolved, and it was adjudged that the plaintiff herein recover of the said Schamberg six per cent. damages upon the amount of the judgment

enjoined, and his costs, and it was further adjudged that the plaintiff might have execution upon his said judgment for forty-six hundred and sixty-seven dollars, with interest at six per cent. per annum from the 3d day of February, 1891, until paid, and for said damages and costs. A copy of said judgment is filed herewith, as part hereof.

And he says that thereafter, on the 1st day of March, 1895, the plaintiff herein caused to be issued upon said judgment the writ of fieri facias directed to the marshal of the United States for the district of Kentucky, commanding him to make of the estate of the said Schamberg the sum of six thousand and twenty-three dollars and seventy-eight cents (\$6,023.78), with interest at the rate of six per cent. per annum from December 1, 1894, until paid, and the further sum of two hundred and thirty-seven dollars and eighty cents (\$237.80) costs; and, while said writ was alive and in full force and effect, it was placed in the hands of the said marshal to do execution thereof, and by him was, while the same was alive and in full force and effect, duly levied upon all the real estate of said plaintiff; and thereafter, on the 22d day of April, 1895, being the first day of the regular April term of the Pike county court, the said marshal did, at the court-house door, in the town of Pikeville, Pike county, Kentucky, being the county where said land is situated, and after due advertisement, offer said land at public outcry to the highest and best bidder, in satisfaction of said writ of fieri facias, when this plaintiff bid for said land an aggregate sum of one thousand dollars (\$1,000), and the same was struck off to him at that price, he being the highest and best bidder; and after deducting the commission of the marshal, thirty-nine (\$39) dollars, said writ of fieri facias was credited with the sum of nine hundred and sixty-one dollars (\$961), and no more; and plaintiff says his said judgment is entitled to said credit, and no more, and he says that said Schamberg has no other property subject to execution, and that he has demanded payment of the balance thereof of defendants, who fail and refuse to pay the same or any part thereof.

Wherefore he prays judgment against the defendants M. H. Houston and George N. Brown for six thousand and twenty-three dollars and seventy-eight cents (\$6,023.78), with interest from December 1, 1894, until paid, subject to a credit of nine hundred and sixty-one dollars (\$961) as of April 22, 1895, and for the further sum of two hundred and thirty-seven dollars and eighty cents (\$237.80) costs, and for the costs of this action, and all proper relief.

James York,
Harvey Myers,
Attys. for Plff.

The judgment in the equity suit, referred to in the petition, was as follows:

"After the submission of the entitled cause, the parties, plaintiffs and defendants, in their proper persons and by their counsel, Hallam and Myers for complainants, and James M. York for defendants, agree to the rendition of the following judgment: It is agreed, and the court adjudges, that the defendant James Harvey Leslie is entitled to have the judgment rendered at the June term of the United States court at Frankfort, Ky., perpetuated, and may have mesne process on the same for the collection thereof, together with the costs and damages hereinafter adjudged. It is further adjudged by the court that the defendant James Harvey Leslie has never had his judgment satisfied, in whole or in part, rendered at Frankfort, Ky., at the June term of the United States circuit court, 1893. It is now and therefore adjudged by the court that the defendant James Harvey Leslie is entitled to recover against the now plaintiff, but former defendant, Meyer Schamberg, the sum of forty-six hundred and sixty-seven dollars (\$4,667), with interest thereon at the rate of six per cent. per annum from the 3d day of February, 1891, until paid, and his costs herein expended, as well as all other costs of a former trial and judgment. It is further adjudged by the court that injunction sued out by the plaintiff, Meyer Schamberg, be, and the same is hereby, dissolved, and the defendant James Harvey Leslie be, and he is, adjudged entitled to recover on the dissolution of said injunction the sum of six per cent. damages on the sum of \$4,667, and may have execution against the plaintiff, Meyer Scham-

berg, for the sum of forty-six hundred and sixty-seven dollars, and for interest on the same from the 3d day of February, 1891, until paid. The clerk of the court will tax the costs of this action, as well as the damages herein adjudged, before issuing execution thereon, which execution will issue at the expiration of sixty days, unless paid. It further appearing from the record in this case that one M. H. Houston and Geo. N. Brown are sureties for plaintiff in the injunction bond, and the said injunction has been adjudged dissolved, it is now adjudged by the court that the said M. H. Houston and Geo. N. Brown be, and they are, directed to pay into this court, within twenty days from the entry of this judgment, the sum of \$4,667, with interest thereon at the rate of six per cent. per annum from the 3d day of February, 1891, until paid, and the costs and damages herein adjudged to be taxed by the clerk of this court. The defendants, not having any desire to obstruct the plaintiff in his right to ingress and egress over the road deeded him, nor over the road known as the 'Mill Road,' since the execution of the writing signed by the plaintiff and filed in this action, it is now agreed and adjudged that the plaintiff have the right to use the road known as the 'Mill Road' for all purposes of ingress and egress to the said plaintiff's lands, he paying the defendant John B. Leslie the damages stipulated for in the writing, in case any ensues, and this cause is continued."

To this petition the defendants demurred, specially on the ground that the petition did not state grounds sufficient to give the court jurisdiction of the subject-matter, and generally on the ground that the petition did not state facts sufficient to constitute a cause of action against the defendants, no breach of the bond being alleged. The court below sustained the demurrer, on the ground that the petition was based on the judgment in equity against the sureties, which, being on its face an agreed judgment between the creditor and the principal debtor, entered without notice to the sureties, was void, and could not, therefore, be made the basis for a recovery. The court intimated some doubt as to whether there was jurisdiction to sue in the federal court on such an obligation.

Harvey Myers, for plaintiff in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts). It is settled by the cases of *Russell v. Farley*, 105 U. S. 433, and *Meyers v. Block*, 120 U. S. 207, 7 Sup. Ct. 525, that the court which grants an injunction, and takes an injunction bond, to save the defendant from loss caused thereby, may, in an ancillary proceeding, summarily enforce this bond against the sureties; but in such a proceeding, at least when the amount of recovery is uncertain, the sureties must have notice and their day in court before the amount of damage is fixed against them. The amount of recovery under this bond was not certain.

We have no doubt that an action at law in the federal court may be brought on such a bond, provided the necessary amount is involved, on the ground that the plaintiff is enforcing rights secured to him under the constitution and the laws of the United States. The cases of *Merryfield v. Jones*, 2 Curt. 306, Fed. Cas. No. 9,486, and *Bein v. Heath*, 12 How. 168, referred to by the learned judge at the circuit, in which a contrary view is taken, were decided at a time when the circuit courts of the United States did not have original jurisdiction to enforce causes of action arising under the laws and

constitution of the United States. This branch of the jurisdiction of the circuit courts was not conferred until the act of 1875.

Coming now to the merits of the case, we concur in the view of the court below that the petition of the plaintiff was based upon the judgment against the sureties entered in the suit in equity. It is manifest that the judgment entered in the equitable proceeding was a mere agreement between the obligee of the injunction bond and the principal obligor, and that the sureties on the bond had no notice of the judgment by process and did not consent thereto. Such a judgment rendered, without notice or process, of course was void. The demurrer was properly sustained. An application was made, after the court's ruling, for leave to amend the petition so as to set out in detail a breach of the bond, without reliance upon the judgment. The learned judge refused to allow this amendment. We cannot say that this was an abuse of his discretion. There ought, however, to be no doubt created by the dismissal of this petition which would embarrass the obligee in the injunction bond in bringing a new suit upon that bond, in which he may be permitted to set up the actual damage which was suffered, and for which the bond renders the sureties liable. The court, therefore, is directed to modify the judgment rendered by inserting therein that the dismissal of the petition is without prejudice to the right of the plaintiff to file a new suit upon the injunction bond, in which he shall not base his right for recovery upon the judgment in equity. Thus modified, the judgment of the court below is affirmed.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. v. NORFOLK & W. R. CO.

(Circuit Court, W. D. North Carolina. October 29, 1898.)

CORPORATIONS—PRIORITY OF LIENS—CONSTRUCTION OF STATUTE.

Code N. C. § 1255, which provides that a mortgage on the property of a corporation shall not exempt such property from execution on a judgment against the corporation for certain specified torts, being in derogation of the common law, must be strictly construed, and cannot be extended to render the property of a railroad company, as against its mortgagee, liable for a judgment against its lessee alone for such a tort committed in the operation of the road, upon which judgment no execution could issue against the lessor.

This is an intervention in a foreclosure suit against a railroad company by a judgment creditor of the defendant, who seeks to have his judgment established as a lien superior to the mortgage.

Joseph I. Doran and Watson, Buxton & Watson, for Norfolk & W. R. Co.

Hatton & Alexander and J. S. Grogan, for G. D. Hampton, petitioner.

SIMONTON, Circuit Judge. This is an intervention in the main cause by Gideon D. Hampton, a judgment creditor of the Norfolk & Western Railroad Company. The Norfolk & Western Railroad Company, on 21st December, 1894, was operating the railroad of the

Roanoke & Southern Railway Company under a lease of the latter road. The intervener, on the night of that day, fell into a cut north of Liberty street overhead bridge in Winston-Salem, N. C., on the right of way of the lessor road. He brought his action for tort in the superior court of Forsyth county, N. C., against the Norfolk & Western Railroad Company, in March, 1895, charging that the accident was the result of its negligence; and recovered judgment 22d February, 1897, in the sum of \$1,000 and costs. This judgment was subsequently affirmed by the supreme court of North Carolina. 27 S. E. 96. At the time of this accident and at the date of the suit the Roanoke & Southern Railway Company was under a mortgage held by the Mercantile Trust & Deposit Company of Baltimore, Md., dated 16th March, 1892. This mortgage was foreclosed in this court, both the Roanoke & Southern Railway Company and the Norfolk & Western Railroad Company being parties defendant therein, and at the sale ordered thereupon was purchased. The purchasers adopted the corporate name of the Norfolk, Roanoke & Southern Railway Company. Conveyance was made to this corporation, and subsequently thereto it conveyed to the Norfolk & Western Railway Company all the railroad property and franchises formerly of the Roanoke & Southern Railway Company. After the suit of Hampton was instituted, but before judgment therein, the Norfolk & Western Railroad Company was placed in the hands of receivers upon bill filed by mortgage creditors, the Fidelity Insurance, Trust & Safe-Deposit Company, and the entire property of this corporation has been sold under the order of the circuit court of the United States. The purchaser at such sale was the Norfolk & Western Railway Company. The intervention is in the proceedings leading up to this last-named sale. When the order for sale was entered in the case of the Mercantile Trust & Deposit Company of Baltimore against the Roanoke & Southern Railway Company and the Norfolk & Western Railroad Company, its lessee, it contained, among other things, this provision:

"The purchaser shall, as part consideration for the railroad property and franchises purchased, take the same, and receive the deed therefor, upon the express condition that, to the extent that the assets or the proceeds of assets in the receivers' hands not subject to any other lien or charge shall be insufficient, such purchaser, his successors or assigns, shall pay, satisfy, and discharge (a) any unpaid compensation which shall be allowed by the court to the receivers; (b) any indebtedness and obligations or liabilities which shall have been contracted or incurred by the receivers before delivery of possession of the property sold in the management, operation, use, or preservation thereof; and (c) also all unpaid indebtedness or liability contracted or incurred by the defendants, or either of them, in the operation of said railroad and property sold, which is prior in lien or superior in equity to said mortgage, except such as shall be paid or satisfied by the receivers, upon the court adjudging the same to be prior in lien or superior in equity to said mortgage, and directing payment thereof."

The question in this case is this: Is this judgment held by the intervener a liability incurred in the operation of the railroad and property sold which is prior in lien or superior in equity to said mortgage? There can be no doubt that, if the suit of Hampton had been brought against the Roanoke & Southern Railway Company, the mortgagor, and the judgment had been obtained and entered against that corpora-

tion, under section 1255 of the Code of North Carolina, the judgment would have been preferred to the mortgage debt. *Ex parte Hudson*, 61 Fed. 369, affirmed as *Trust Co. v. Hudson*, 15 C. C. A. 651, 68 Fed. 758, and 25 U. S. App. 257. But the judgment was obtained in a suit against the lessee of the Roanoke & Southern Railway Company, in which suit it was not a party on the record. The rule is well established in North Carolina that the lessor of a railroad is responsible for the negligent acts of his lessee in operating the railroad. The sovereign power has clothed the lessor with certain franchises and privileges. These involve responsibility to the sovereign for their proper exercise. And this responsibility can neither be evaded nor lost by shifting its exercise on another by lease or otherwise. *Logan v. Railway Co.*, 116 N. C. 940, 21 S. E. 959. And, if the Roanoke & Southern Railway Company had been the defendant, or one of the defendants, in the suit, it could have been held responsible. Does the judgment against the lessee operate also against the lessor, and create a liability? The case of *Logan v. Railway Co.* and all the other cases in this line proceed upon the idea that the lessee is the agent of the lessor in discharging its duties to the public, and that so the principal is responsible for the acts of its agent. But it can scarcely be contended that a judgment against the agent alone can be enforced as a judgment against the principal. It may afford conclusive evidence in a suit against the principal; may, without doubt, lead to a judgment against him. But it cannot in itself operate as a judgment against him, nor would it sustain an execution against his property. Section 1255 of the Code of North Carolina is in these words:

"Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in the courts of the state against such incorporation for labor performed, nor for materials furnished such incorporation, nor for torts committed by such incorporation, its agents or employees, whereby any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

The protection afforded by this section is to an execution for the satisfaction of any judgment obtained in the courts of the state against such incorporation; that is to say, the incorporation which has made a mortgage upon its property or earnings, whether in bonds or otherwise. This is a statutory remedy, and must be strictly followed. *East Tennessee, V. & G. R. Co. v. Southern Tel. Co.*, 112 U. S. 306, 5 Sup. Ct. 168. It is in derogation of the common law. Its purpose is to displace a vested lien, and either annul or greatly vary the terms of the mortgage contract. It must, therefore, be strictly construed. *Douglass v. Lewis*, 131 U. S. 75, 9 Sup. Ct. 634. In enforcing it courts cannot add to the words of the statute, and make them apply not only to executions upon judgments obtained against the mortgagor corporation, but also to judgments obtained against its officers and agents. So, were the object of this intervention to obtain payment out of the proceeds of sale of the Roanoke & Southern Railway Company, the judgment is not within the protected class. This intervention, however, is in a cause in which the Fidelity Insurance, Trust & Safe-Deposit Company, mortgagee of the Norfolk & Western Railroad

Company, sought the foreclosure of its mortgage on the property and franchises of that company. It would practically displace the lien of that mortgage in favor of a judgment obtained against the Norfolk & Western Railroad Company for an accident occurring not on the line of road subject to this mortgage, but on the line of a leased railroad. This question cannot arise under these proceedings. The intervener pursues the Norfolk & Western Railway Company because it has become the purchaser of what was once the property of the Roanoke & Southern Railway Company. This property was sold under an order of this court, which made the purchaser responsible for all liabilities of the Roanoke & Southern Railway Company and of the Norfolk & Western Railroad Company which are prior in lien or equity to the mortgage foreclosed in that suit,—the mortgage of the Roanoke & Southern Railway Company. The purchaser in that case was the Norfolk, Roanoke & Southern Railway Company. As such purchaser it became liable accordingly. And when it conveyed all that it had at that sale to the Norfolk & Western Railway Company, the latter company also became subject to the same liability; that is to say, it became liable to pay any claim against the Roanoke & Southern Railway Company or the Norfolk & Western Railroad Company prior in lien or superior in equity to the mortgage of the Roanoke & Southern Railway Company. But section 1255 secured such priority only to an execution upon a judgment against the mortgagor corporation. The intervener, as has been seen, has no such judgment, and does not come within the terms of this section. The intervention is dismissed.

FOSTER et al. v. ELK FORK OIL & GAS CO. et al.
(Circuit Court of Appeals, Fourth Circuit. November 1, 1898.)

No. 262.

1. MINES AND MINERALS—CONSTRUCTION OF OIL LEASE—ABANDONMENT.

An oil and gas lease provided that the lessee should pay as rental a share of all oil produced, and a stipulated sum for each gas well the product of which was utilized. Its term was 10 years, and as much longer as oil or gas was produced in paying quantities. It bound the lessee to complete one well in a district named within one year, or pay a fixed sum per annum thereafter until such well should be completed. The lessee completed a well within the year, which was unproductive, and then ceased further operations. *Held*, that the lease necessarily contemplated, as the sole consideration to the lessor, the development of the leased property, and that by ceasing efforts to that end for a number of years the lessee abandoned the lease, and lost all rights thereunder.

2. SAME—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The decisions of the courts of a state as to the construction and effect of mining leases therein establish a rule of property which will be recognized and followed by the federal courts.¹

Appeal from the Circuit Court of the United States for the District of West Virginia.

¹ As to the following of state decisions establishing rules of property by the federal courts, see section 9 of note to *Wilson v. Perrin*, 11 C. C. A. 84, and section 6 of the supplementary note by the same title to *Hill v. Hite*, 29 C. C. A. 562.

This was a suit in equity by the Elk Fork Oil & Gas Company and others against George E. Foster and others to enjoin interference by defendants with the operations of complainants under certain oil leases. From a decree for complainants, defendants appeal.

A. Leo Weil (Caldwell & Caldwell, on the brief), for appellants.

W. P. Hubbard and Thomas P. Jacobs (David Sterrett, on the brief), for appellees.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the district of West Virginia. The pleadings are voluminous. They consist of an original, an amended, and a supplemental bill by the Elk Fork Oil & Gas Company et al., the appellees, answers of appellants J. M. Guffey, E. H. Jennings et al., cross bill of J. M. Guffey, E. H. Jennings et al., answers thereto, original and amended bill by George E. Foster, treated as a cross bill, and answers thereto. The conclusion reached does not require any further discussion of the pleadings. The object of the writ was by injunction to protect the complainants in the possession of certain oil wells which they had drilled and were operating under recent leases from the landowners, and to restrain the defendants from asserting rights which the defendants claimed under prior leases from the landowners to William Johnston, which the complainants charged had been abandoned, and were of no validity, for the reasons that from 1889 to the institution of the suit, in March, 1897, neither Johnston nor his assignees had ever entered upon or made any search for oil or gas on any of the tracts in possession of the complainants. One William Johnston, in the year 1889, procured from a large number of farmers about 175 leases of land lying in four districts in Tyler county, W. Va., covering about 20,000 acres. The districts are named "Ellsworth," "Lincoln," "Union," and "Meade." Each contract or lease was several, covering separate tracts of land; the parties stipulating and contracting each for himself. They were all in the same form, containing the same provisions, covenants, and stipulations. Each of them, as will be seen, provided for the digging within a year of one well in the district of Ellsworth, Lincoln, Union, or Meade. Within the year, Johnston dug a well within one of these districts to a great depth, some 2,000 feet. It proved to be a dry well. It produced neither oil nor gas. After that effort, no well whatever was dug within either or any of these four districts under any of these contracts with Johnston. Wells were dug within these districts, under new contracts, by Johnston or his assignees. Wells were dug in this county, outside of these districts, by Johnston. The appellees have acquired, under recent leases, the right of taking oil and gas from some of the lands mentioned in the old Johnston leases. The issues in the case grew out of the conflicting claims of appellees, who hold under recent leases, and appellants, who hold under Johnston. The question in the case is, are these Johnston leases of 1889 valid and subsisting, or have he and those under him lost all right thereunder?

The court below held that the leases were no longer valid and subsisting, and that neither Johnston nor those claiming under him had any rights thereunder. In its decree it put its conclusion upon the ground of abandonment on the part of Johnston. An appeal was taken and allowed, and the questions are here on assignments of error.

The contract to be construed was entered into by the lessor in consideration of the covenants and agreements hereinafter mentioned, and for the purpose and with the exclusive right in the lessee of drilling and operating for petroleum and gas. The term is for 10 years, and as much longer as oil or gas is found in paying quantities. The covenants and agreements, the consideration of the lease, are: The lessee to give to the lessor the full equal one-eighth of all the petroleum oil obtained or produced on the leased premises, and to deliver the same in tanks or pipe lines to the credit of the lessor. If gas is obtained in sufficient quantities to utilize, the consideration in full to the lessor shall be \$100 per annum for each gas well drilled on the premises, if there be sufficient pressure to guaranty the laying of a pipe line to convey to market, payable 90 days after the line is laid. Then follows a grant by the lessor to the lessee of the use of water from the premises leased necessary to operation thereon, the right of way over and across the premises to the place of operating, with the exclusive right to lay pipes and convey oil and gas from the letten premises as well as the adjoining farms, and the right to remove any machinery or fixtures placed by the lessee on the premises. All damages to the growing crop by laying of pipes to be paid by lessee. Ten acres around the buildings are not to be operated by lessee, unless the lessor decides to have same drilled. The lessor to have the use of gas for domestic purposes, after the boilers on the premises are supplied. Every one of these covenants, the consideration for the lease, evidently and clearly contemplates active operation upon the demised premises. The lease contains this provision, fixing the time when the operation must begin: "One well to be completed within one year, in Ellsworth, Meade, Lincoln, or Union district from the date hereof, unavoidable accidents excepted." In case of failure to complete operations on a well within such time, the lessee agrees to pay the lessor for such delay 10 cents per acre per annum after the time for completing the well as specified; the lessor agreeing to accept this sum as full payment for the yearly delay, until one well shall be completed. The failure to complete one well, or to make the payment as stipulated, will avoid the lease. The consideration for this lease is the covenants; and these covenants, as has been seen, contemplate active operations on the demised premises, the lessor looking for his reward to the result of these operations, and dependent upon them. The clause last quoted fixes the time within which active operations must commence, and sets forth the penalty for failure so to begin. If the well has been begun and is completed within a year, no money whatever is paid. If not so completed, then the money payment ceases when the well has been completed. If no well is dug at all, money is paid, not in consideration of the demise, but as penalty for not digging the well. Note the language, "one well." The digging of one well is a guaranty that the operations, the consideration for the de-

mise, have begun. The agreement to dig one well within one year secures the prompt beginning of these operations. The completion of the well saves the penalty. It does not amount to a fulfillment of the covenants. The consideration, therefore, for this lease was the prospective rents and royalties the lessor would enjoy if the lessee, by diligent search, could find oil and gas in paying quantities. If the lease failed to bind the lessee to diligent search for oil or gas, it was without consideration, binding on neither party, and voidable at the pleasure of either. *Cowan v. Iron Co.*, 83 Va. 547, 3 S. E. 120; *Petroleum Co. v. Coal, Coke & Mfg. Co.*, 89 Tenn. 381, 18 S. W. 65. See *Ray v. Gas Co.*, 138 Pa. St. 576, 20 Atl. 1065. In this last quoted case, the supreme court of Pennsylvania says:

"The clear purpose of the lessor was to have his lands operated for oil and gas, and the condition was inserted for his benefit. Whilst the obligation on part of the lessee to operate is not expressed in so many words, it arises by necessary implication. The lease was for the expressed purpose of drilling and boring for oil or gas; the lessor, in a certain event, to receive a share of the production as a royalty or rent, and, in another event, to be paid \$500 per annum for each gas well, the product of which was conducted from the land for consumption. If a farm is leased for farming purposes, the lessee to deliver to the lessor a share of the crops in the nature of rent, it would be absurd to say, because there was no expressed engagement to farm, that the lessee was under no obligation to cultivate the land. An engagement to farm in a proper manner, and to a reasonable extent, is necessarily implied. The clear purpose of the parties to this lease was to have the lands developed, and the half-yearly payments, and the other sums stipulated, were intended not only to spur the operator, but to compensate Ray for the operator's delay or default."

The contract provides that one well shall be dug within a specified time. This phrase, "one well," is capable of one of two constructions. It may be used in the sense of "but one well." If it be used in this sense, as the well has been dug, and proved to be dry, the performance of the covenants in the contract on the part of the lessee has become impossible. He can dig no more wells, and can never supply the petroleum or the oil. *Steelsmith v. Gartlan* (W. Va.) 29 S. E. 978. "Such a lease must be construed as a whole, and, if there is no provision therein contained requiring the boring of another well after the first unsuccessful attempt is completed and abandoned, the lease becomes invalid, and of no binding force in any of its provisions." The phrase, however, may be construed to use one well in the sense of a pioneer in a series. If it be used in this sense, the lessee having dug the one well, and then having ceased to dig any other well within the four districts, would seem to have abandoned all effort towards the performance of the covenants which were the consideration of the contract, and so may be held to have abandoned the contract itself.

The leases, as has been said, in the four districts, all had the same provisions. The lessee bored one well. It proved a failure in every other respect except that it saved the penalty, having been dug within one year. The well itself was dry. This is the only work done by the lessee on any of the land covered by these leases. No further effort was made. He failed to establish his rights. His inaction may well be construed an abandonment of these rights under his leases.

"A vested title cannot ordinarily be lost by abandonment in a less time than that fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. A lease of a right to mine for oil, etc., stands on different ground. The title is inchoate, and for purposes of exploration only until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the successful search is abandoned. If oil is found, then the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of the contract." *Crawford v. Ritchey* (W. Va.) 27 S. E. 220. In this case the lease was for 20 years for the sole and only purpose of drilling and operating for petroleum oil and gas. The same doctrine is reaffirmed by the same court very recently in *Steelsmith v. Gartlan*, 29 S. E. 978. Both of them are in full accord with the supreme court of Pennsylvania. *Oil Co. v. Fretts*, 25 Atl. 732. The contract we are construing is a contract made and to be performed in West Virginia. It is a contract relating to land in that state. The cases quoted lay down a rule of property, stating the controlling doctrine peculiar to mining leases in that state. The federal courts recognize and follow the decisions of courts of last resort in the state.

It is earnestly contended that the lessee was not obliged to bore a well on every parcel included in the four districts. We do not say that he was obliged to do this. Perhaps, when he found by his experiment, that he had gone over 2,000 feet, and found nothing, he was under no obligation to continue his explorations. *Glasgow v. Charties Oil Co.*, 152 Pa. St. 48, 25 Atl. 232. But we are of the opinion that, when he tried once, and failed, and after a reasonable time did not try again, he failed to establish his interest in this land, and lost all his rights under the contract. As is said by the supreme court of West Virginia in *Steelsmith v. Gartlan*, supra:

"The demise for the purpose of operating for oil and gas for the period of five years is dependent on the discovery of oil or gas in the search provided for; and, if such search is unsuccessful, the demise falls therewith, as such discovery is a condition precedent to the continuance or vesting of the demise. The lessee's title, being inchoate and contingent, both as to the five-years limit and term thereafter on the finding of oil and gas in paying quantities, did not become vested by reason of his putting down a nonproductive well. This gave him no new or more extensive rights than he enjoyed before, but in fact destroyed all his rights under the lease."

The decree of the circuit court is affirmed, with costs.

UNITED STATES v. DEVEREUX et al.

(Circuit Court of Appeals, Fourth Circuit. November 1, 1898.)

No. 256.

1. UNITED STATES—PUBLIC NATURE OF PROPERTY INTERESTS—RIGHTS AS SUITOR. The United States holds whatever interests it may have in property, though claiming as cestui que trust under a deed between private persons, for public purposes, and cannot be prejudiced by any negligence or laches of its officers or agents, nor bound by any statute of limitations.

2. SAME—DETERMINATION OF RIGHTS BY COURTS—RULES GOVERNING.

When the United States comes into its own courts as a suitor, its rights and equities are to be determined on their merits by the same rules governing those of private individuals.

3. DEED CREATING TRUST—CONSTRUCTION—INTEREST OF CESTUI QUE TRUST IN PROPERTY.

A conveyance of land in trust to pay a debt due to the United States by sales to be made in the discretion of the trustee, the remainder to be held to the use of another, does not vest the United States with any interest in the land; and, in a suit against a third person claiming the land adversely, it can only stand upon the rights of the trustee.

4. ADVERSE POSSESSION—PRESUMPTION OF TITLE.

Where a trustee to whom land was conveyed never took possession of the land, nor attempted to execute the trust in any manner until after the lapse of more than 60 years, during all of which time the land was held by others claiming title adversely, it will be presumed as a matter of fact that the possession of such adverse claimants rested upon a grant.

5. DEED—DELAY IN RECORDING—INTERVENING TITLE.

Under the registration act of North Carolina of 1815, which required conveyances to be recorded within one year after their date, a deed, whether considered as an absolute conveyance or as a mortgage, which was not recorded until some 12 years after its execution, was void as against a sale of the land after its date, and before its registration on a judgment against the grantor.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

This case comes up on appeal from the decree of the circuit court of the United States for the Eastern district of North Carolina. The bill is filed by the United States against the defendants, seeking satisfaction of certain claims of the United States, by the sale of lands in the state of North Carolina, to which the defendants assert title. The facts as they appear in the record are as follows: At the May term, 1816, of the circuit court of the United States for the district of North Carolina, held at Raleigh, the United States recovered two judgments against Benjamin Smith,—one in the sum of \$3,250, with interest from 28th November, 1803, and costs; and the other in the sum of \$3,251.27, with interest from 28th November, 1803, and costs. The judgments were duly entered, and executions issued thereon. The United States aver that they remain unpaid. The marshal for that district, in order to satisfy the judgments, levied upon certain slaves of the defendant Smith. Smith was unwilling that the slaves be sold under these executions, and, to this end, negotiations were opened and concluded between the marshal and John F. Burgwin, acting as the agent and friend of Smith and his wife, the result of which was that Burgwin entered into bond in the penal sum of \$20,000, the condition of which recited that, at the instance of Burgwin, the marshal had given up the possession of the negroes, and substituted in lieu thereof a right to levy upon and sell in satisfaction of the judgment certain lands, the legal title to which stood in the name of Burgwin, the sale of which should be consented to by Burgwin. Among these lands was the land concerning which this bill is filed. It is described as follows: "A certain piece or parcel of land, lying and being in the county of Brunswick and state of North Carolina, commonly known by the name of the 'Cape Island' or 'Bald Head'; beginning at the point of high land next to Cape Point; running thence, along the sea shore, north, 20 degrees east, 624; thence N. 75; thence So., 85 W., 35; then So., 55 W., 60; then N., 70 W., 48; then So., 80 W., 10, to a little marsh; then to a great marsh at the mouth of Cape Fear; now then So., 65 W., 100; then, along said marsh, So., 55 E., 290; then So., 40 W., 80; then So., 75 35, to the sea shore; then So., 55 E., 364, to the beginning, which tract of land was granted to Thomas Smith by grant bearing date the 8th day of May, 1713." This tract of land was of the inheritance of Mrs. Sarah Dry Smith, wife of Benjamin Smith, and on the — day of —, 1816, was conveyed by deed of Smith and his said wife to

John F. Burgwin, in terms conveying a fee simple absolute. It is alleged, however, and admitted, that, although absolute in its terms, the deed was really intended between the parties as a defeasible deed by way of mortgage. This deed was not recorded until 29th July, 1829. On 25th September, 1820, Burgwin executed to Joseph G. Swift a conveyance in trust of certain lands in New Hanover and Brunswick county, in North Carolina, among them a tract of land conveyed to him by George Hooper, and this tract, Smith's Island, the Cape Island, or Bald Head. This deed recites the recovery of the judgment in 1816 against Benjamin Smith; the levy under execution upon his negroes; his desire to avoid a sale of the negroes; the interposition of Burgwin; the execution of the bond by him in the penal sum of \$20,000; the substitution of the lands for the slaves, especially of the tract conveyed by George Hooper; that the sale of the lands had not yet taken place; that both Burgwin and Smith desired that the former be relieved from his responsibility, and that the comptroller of the treasury of the United States had consented to release Burgwin from his penal obligation, provided that he would vest the property in Joseph G. Swift, as a trustee, for securing said debt to the United States, and for other purposes; that one deed had been executed to this end in 1818, which was not satisfactory to the comptroller, and then this deed was made. It conveys in fee to Swift a number of tracts of land in the above-named counties of North Carolina, among them the Hooper tract, and this Smith Island, Cape Island, or Bald Head tract. The conveyance is to the following uses, intents, and trusts hereinafter mentioned. "First, to pay the before mentioned debt to the United States by a sale or sales to be made in such manner as he, the said Joseph G. Swift, may think best for enhancing the value of the lands, and then in trust to and for the separate use of said Sarah Dry Smith, during her coverture, free from the control or debts of her husband, Benjamin Smith, and, after the coverture, then in trust for the survivor of them, the said Benjamin and Sarah Dry Smith, for life, and afterwards in trust for the said Benjamin, his heirs and assigns, forever, with power, nevertheless, in said Sarah Dry Smith during her coverture (after the said debt to the United States is satisfied, and all necessary costs and charges are paid in accomplishing a sale for said purposes), by any instrument of writing in nature of a deed or of a last will and testament, executed in the presence of one or more creditable witnesses, to limit and appoint the said lands, or any part thereof, to any person or persons, upon any uses, trust, or estate which she may deem proper, which said limitations and appointments shall then take place and supersede the further trusts and uses declared." This deed was not recorded until 29th July, 1829. On 19th June, 1833, an indenture tripartite was executed between Joseph G. Swift, John F. Burgwin, and Thomas P. Devereux, which recited the execution of the deed of 25th September, 1821, between Swift and Burgwin, in detail, and that it was thought to be more for the interest of the United States that the lands and premises therein described be conveyed to Devereux, so as to substitute him in the place of Smith; and thereupon both Smith and Burgwin, for the purposes of this substitution, conveyed all these lands, including the Hooper lands and the Bald Head tract, to Devereux, in fee for such estate and under such terms, conditions, and limitations as the same remained in the said Joseph G. Swift or John F. Burgwin, or either of them, at and immediately before the signing and ensembling of these presents, but for no other or greater estate than the said Joseph G. Swift or John F. Burgwin, or either of them, then had and held the same. This deed was duly recorded.

Thomas P. Devereux died in March or April, 1869, leaving a large number of heirs at law and distributees, "scattered from the state of Texas to the state of New York"; and in 1891 proceedings were instituted in the circuit court of the United States for the Eastern district of North Carolina by the United States against the descendants of Thomas P. Devereux, praying that they be relieved of the trust, and a new trustee appointed. These proceedings resulted in the appointment of another, Thomas P. Devereux, as trustee. He is a party to the case at bar as defendant; has been served, but has not appeared or answered, and is under decree pro confesso. Neither Burgwin nor Smith nor the United States have ever been in possession of these lands, or any part of them. Smith and his wife remained in possession, except that

the United States has had a lease of a small tract of the land on Bald Head for the past 15 years, for a lighthouse or some such public purpose. Sarah Dry Smith, the wife of Benjamin Smith, died in 1821, having by her last will and testament devised all her estate, real and personal, to her husband, Benjamin Smith, she having made no further disposition of the Bald Head or Smith's Island property in her lifetime. Benjamin Smith died in the year 1826, in possession of said property; and, by his last will and testament, he devised all his estate to Mary Grimke. At the March term, 1829, of the court of pleas and quarter sessions of the county of Brunswick, N. C., Robert Horne, a creditor of Benjamin Smith, obtained a judgment against his executors, tested first Monday in June, 1829, and issued execution thereon, which was levied upon the lands of Smith's estate in the hands of his devisee, Mary Grimke. The property was sold by the sheriff, and at the sale this Bald Head or Smith's Island land was purchased by John Walker and John H. Holmes, and a deed made to them. Holmes died shortly thereafter, and his estate in these lands descended to his sole heir at law, John W. Holmes. At the death of John W. Holmes, his heirs conveyed all their estate to John Walker. Soon after the execution of the sheriff's deed to Walker and Holmes, they went into actual possession of the lands conveyed, and Walker remained in possession, first with John H. Holmes, then with John W. Holmes, and then with the heirs of John W. Holmes, and afterwards in sole seisin until his death in 1862. Since that time, all of the defendants but Thomas P. Devereux (heirs at law of John Walker) have been in possession of the land. The lease to the United States above spoken of was made in 1881 (31st January). It covers a small part of this Bald Head tract, and is for the term of 15 years. The United States entered under this lease, and remained and still remains in possession under it.

At December term, 1825, of the court of pleas and quarter sessions for the county of New Hanover, N. C., the administrators of James Richard obtained a judgment against Benjamin Smith, on a debt contracted before the deed of Smith to Burgwin was executed. The sheriff, under execution issued upon this judgment, levied upon and sold the Hooper lands to William W. Jones. The Hooper lands, as has been seen, are included in the Burgwin-Smith deed. At the May term of the circuit court of the United States for the district of North Carolina, the case of Doe, on the demise of Joseph G. Swift, against William Watt Jones, was tried, the question in which was the validity of this Burgwin-Smith deed. The cause was tried before Chief Justice Marshall and Judge Potter, the district judge, on an agreed statement of facts. The court held "that the deed from Burgwin to Smith was void and inoperative to pass title to the lands mentioned therein, for want of due and legal registration thereof." The bill sets up the rights of the United States as cestui que trust under the Burgwin-Smith deed, and seeks a sale of the lands, Smith Island or Cape Island or Bald Head, and the application of the proceeds of sale to the Smith debt. The bill prays that the deed to John Walker be declared null and void, and that the defendants be required to execute a quitclaim in the lands to Devereux, trustee, or the purchaser of the premises under an order of sale by the circuit court; that the lands be sold for the purpose of satisfying the debt due to the complainant; and that the purchaser at such sale be let into exclusive possession; and for general relief. The answer set up an objection for want of proper parties. The agreed statement of facts, a part of the record, contains this clause: "It is agreed as a fact that all necessary parties to this action have been brought before the court." On this point no opinion is expressed. The answer then admits the execution of the Burgwin-Smith deed, and avers that the same was inoperative because not properly recorded. It also admits the execution of the deed by Smith and wife to Burgwin, and avers that it, although absolute on its face, was in fact a mortgage, and void for want of registration. It sets up the title under execution to John Walker, and the long, continuous, adverse, and actual possession of the lands by them and their ancestor, as in bar of any claim by the complainant. It sets up the plea of the statute to the right of action of the trustee under the Swift deed, and relies on the presumption from lapse of time to perfect their title.

E. K. Bryan, U. S. Atty.

George Rountree and E. S. Martin (P. D. Walker and Junius Davis, on the brief), for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge (after stating the facts). It was suggested in argument that as the United States in this case comes into court claiming rights as cestui que trust under a deed between private parties, and asserting these rights as a private individual would, the case does not involve any governmental right or duty; that, therefore, the ordinary rules controlling courts of equity as to laches should be enforced. This position cannot be maintained. The United States do not and cannot hold property as a monarch may for private or personal purposes. *Van Brocklin v. Tennessee*, 117 U. S., at page 158, 6 Sup. Ct. 670. In the present case the United States holds what title it has to the property in question as it holds all other property for public and private purposes (*U. S. v. Insley*, 130 U. S. 265, 9 Sup. Ct. 485); and cannot be prejudiced by the negligence of the officers and agents to whose care their interests were confined; nor are they bound by any statute of limitations (*U. S. v. Railway Co.*, 118 U. S. 120, 6 Sup. Ct. 1006).

With this exception, however, and in perfect consistency with it, when a sovereign comes into one of its own courts of its own accord, and seeks relief, all the rules established for the administration of justice between individuals are applied, and bind all parties. *Port Royal & A. Ry. Co. v. South Carolina*, 60 Fed. 552; *Prioleau v. U. S.*, L. R. 2 Eq. 659.

And in *U. S. v. Flint*, Fed. Cas. No. 15,121 (Field, circuit judge), we find:

"If, on consideration of the circumstances of a given case, it be inequitable to grant the relief prayed against a citizen, such relief will be refused by a court of equity, although the United States be the suitor."

The question naturally arises: What interest did the United States take in this land now claimed by defendants, assuming for the present that the deed was recorded in proper time?

In *Neilson v. Lagow*, 12 How., at page 106, the supreme court, discussing a deed in terms just like this, says:

"The deed in question conveyed the land to Badollett and others, in trust to sell so much thereof as might be necessary to raise sufficient money to pay a debt due from the bank to the United States. It is clear this was not in any sense a purchase of land on account of the United States. In the land itself, the United States acquired by the deed no interest. They were not even clothed with a right to acquire such an interest through the aid of a court of equity, for their title was not to the whole proceeds of the lands, whatever they might be, but only to so much of them as might be necessary to pay the debt of the bank. To this extent both the creditor and the debtor had the right to insist on a sale; and whatever residue of land should remain was by force of the deed, operating by means of a shifting or secondary use, to go to the bank upon payment in full of the debt due to the United States. It is true, the deed contains some language, which, taken by itself, might raise a use, executed in the United States; but it is well settled that such

language is controlled by an intent manifested in the instrument to have the legal estate remain in trustees, to enable them to execute a trust which the deed declares; and where, as in this case, the trust is to sell and convey in fee simple absolute, a legal estate is vested in the trustees commensurate with the interest which they must convey in execution of the trust. *Mott v. Buxton*, 7 Ves. 201; *Leonard v. Sussex*, 2 Vern. 526; and the cases in note (f) to *Chapman v. Blissett*, Cas. T. Talb. 145-150; *Trent v. Hanning*, 7 East, 99; *Doe v. Willan*, 2 Barn. & Ald. 84."

We must deal with this case, therefore, as between the trustee and the defendants. Is there any estate left in the trustee, or any title which can be enforced in any court of law or equity? The defendants, through their ancestor, went into possession of the land in controversy in 1829, under sheriff's deed, in actual possession, under color of title. *Tate v. Southard*, 10 N. C. 119; *Kron v. Hinson*, 53 N. C. 347; *Hilliard v. Phillips*, 81 N. C. 99. The present proceedings, seeking to enforce the performance of his duty by the trustee, commenced 21st August, 1893, against them, after a period of actual, continuous, open, adverse possession for over 60 years. During all that time there has been no entry or possession by the trustee or any one claiming under him. Were he now to attempt to execute his trust, and to enter and offer for sale these lands, or to bring his action of ejectment therefor, or were his cestui que trust to adopt the course suggested in 2 *Lewin, Trusts*, 868, as the only course to be adopted, and bring the action in the name of the trustee, such an action must, of necessity, fail. After this great lapse of time, courts will presume anything and everything to have been done which, if done, would be a bar to the claim. *Id.* 869; *Roe v. Ireland*, 11 East, 280. This rule of presumption is one of policy as well as of convenience, and necessary for the peace and security of society. "If time," said Lord Plunkett, "destroys the evidence of title, the law has wisely and humanely made length of possession a substitute for that which has been destroyed. He comes with a scythe in one hand to mow down the muniments of our rights, but in his other hand the lawgiver has placed an hourglass, by which he metes out incessantly those portions of duration which render needless the evidence he has swept away. *Whart Ev.* § 1338, note 5."

It is not necessary to presume that a deed was, in point of fact, executed. It is sufficient if the evidence leads to the conclusion that a conveyance might have been executed, and that its existence would be a solution of the difficulty arising from its mere execution. *Fletcher v. Fuller*, 120 U. S. 546, 547, 7 Sup. Ct. 667; *McLeod v. Rogers*, 2 Rich. Law, 22. Presumption does not operate like the statute of limitations, and bar a right which is known to exist; or like laches, which deprives one of a right which did exist. It operates as evidence, and establishes the conclusion that the right which did exist has been duly relinquished by the possessor of it.

Wharton, in his *Law of Evidence* (section 1348, note 1), puts it in this way:

"Thus, the lapse of time does not of itself furnish a conclusive legal bar to the title of the sovereign, agreeably to the maxim, 'Nullum tempus,' etc., yet, if the adverse claim could have had a legal commencement, juries are instructed or advised to presume such commencement after many years of uninterrupted adverse possession or enjoyment."

Laches and the statute of limitations affect the remedy. Presumption clothes with a right. The statute of limitations ripens a trespass into a legal title because of neglect of the true owner. Presumption concludes that a lawful origin existed.

The supreme court of the United States, in *U. S. v. Chaves*, 159 U. S., at page 464, 16 Sup. Ct. 62, says:

"It is the general rule of American law that a grant will be presumed upon proof of an adverse exclusive and uninterrupted possession for 20 years, and that such rule will be applied as a *presumptio juris et de jure* whenever, by any possibility, a right may be acquired in any manner known to the law. * * * Thus, although lapse of time does not of itself furnish a conclusive bar to the title of the sovereign agreeably to the maxim, '*Nullum tempus occurrat regi*,' yet, if the adverse claim could have a legal commencement, juries are instructed to presume such commencement after many years of uninterrupted possession or enjoyment."

Apply these to the present case. The trustees had full power of sale. The purpose of the sale, however, was, among other things, to satisfy a debt due to the United States. The long, continuous, uninterrupted, and open possession and claim of the Walkers may well justify the presumption of a conveyance by the trustee, of a release of the mortgage, or of satisfaction of the judgment by the United States, upon payment, or in any other mode, or of a release of its claim. This presumption is encouraged by the result of the suit by the trustee against William W. Jones in the United States circuit court at Raleigh. It is made almost certain by the fact that the United States accepted and holds a lease as tenant of these defendants of a part of the land included within the boundaries of the territory they now claim.

2. Did either Burgwin or Swift have a title to these lands which can prevail against the title of the defendants? There can be no doubt that the deed of Smith and wife to Burgwin, although absolute in terms, was intended for, and must be deemed to be, a mortgage. This was the substantial object of the conveyance, and equity will look to that. *Peugh v. Davis*, 96 U. S. 332. And this is so under the general principles of equity jurisprudence determinable by the federal courts. *Russell v. Southard*, 12 How. 139. The Burgwin-Swift deeds are deeds of trust in the nature of a mortgage. If this deed be treated as an absolute deed, it was not recorded until 1829, years after its execution, although the act of 1715 required its record within 12 months from its date. If it be a mortgage, it would seem to come within the condemnation of *Gulley v. Macy*, 84 N. C. 434. "Such a grantee can acquire no title as against creditors," prior or subsequent (*Halcombe v. Ray*, 23 N. C. 340), "or subsequent purchasers; not because of any evil intent to perpetrate a fraud, but because he cannot bring himself within the provisions of a statute which allows a mortgage or deed of trust to take effect from registration only. As an absolute deed, it cannot be registered, because that was not the intent of the parties, nor as a mortgage, because it does not purport to be one, and so would fail to give the notice the statute desires." Moreover, both this deed and that of Burgwin to Swift were recorded in 1829, after the sheriff's deed to Walker. "A mortgage deed not registered in time, when registered, has no relation back to

its date, but operates only from the time of registration. It shall not, therefore, avail anything against an execution levied after its date, and before its registration." *Tate v. Brittain*, 10 N. C. 55. In *Cowan v. Green*, 9 N. C. 384, it is said: "A mortgage not registered in time is inefficient against purchasers subsequent to the mortgage whose conveyances are registered before the mortgage." In *Davidson v. Beard*, 9 N. C. 520, a creditor subsequent to an unrecorded mortgage obtained a judgment and levied an execution, not having notice of the mortgage when the debt was incurred, but he did have notice before levy. The execution was held to have priority over the levy. In the same case it was held that under the act of 1715 a subsequent purchaser has the same priority over an unrecorded mortgage as a subsequent mortgagee, and so is any other subsequent incumbrancer.

It is said, however, that if the deed of the Smiths to Burgwin, and of Burgwin to Swift, be inoperative as to the defendants, because of nonregistration, this omission was cured by the deed of Burgwin and of Swift to Devereux, trustee, in 1833, which was duly recorded. The conveyance to Devereux was for such estate and under such terms and conditions and limitations as remained in the said Joseph G. Swift or John F. Burgwin, or either of them, "at and immediately before the signing and sealing of these presents," but for no other or greater estate than the said Joseph G. Swift or John F. Burgwin, or either of them, then had and held in the same. What estate had Burgwin in himself when this Devereux deed was executed? None, for as between him and Swift he had parted with all his interest in the property and power over it, for good and valuable consideration. Nothing was left in him. His deed binds him, and as to him operated, with or without registration. *Pike v. Armstead*, 16 N. C. 110; *Walker v. Coltraine*, 41 N. C. 79; *Hodges v. Spicer*, 79 N. C. 223.

With regard to Swift's conveyance to Devereux. The latter rests entirely upon Swift. He gets all that Swift had, but no more. The deed was intended to operate, and could only operate, as the substitution of one trustee for another. In establishing the present claim against the defendants, use must be made of Swift's title; and, as to these defendants, it would seem that that is void. The decree of the circuit court dismissing the bill is affirmed.

WHEELING BRIDGE & TERMINAL RY. CO. et al. v. REYMANN BREWING CO.

(Circuit Court of Appeals, Fourth Circuit. November 1, 1893.)

No. 261.

1. RAILROADS—FORECLOSURE SUITS—POWER OF COURT TO ADJUST LIENS.

Upon a petition of intervention, in a suit to foreclose a railroad mortgage, by one claiming a prior vendor's lien on a portion of the right of way of the road, the court may, if it sustains the claim for a lien, in order to prevent a dismemberment of the road by a sale of such portion, order the amount found due the claimant paid by the receiver from the earnings of the road, or, if necessary, from the proceeds of the entire road

when sold, or, as a last resort, it may decree the separate sale of the portion covered by the lien.

2. STATUTE OF FRAUDS—PAROL CONTRACT FOR RIGHT OF WAY—PART PERFORMANCE.

A contract for right of way for a railroad, though in parol, may be enforced by compelling payment of the consideration, where the railroad has taken possession thereunder and constructed its road.

3. EQUITY—LACHES—MERE LAPSE OF TIME.

Where the right of way across property was donated to a railroad company on condition that it should make good any injuries to the buildings of the donor which might be injured by the location or building of the road, and the money value of such injuries was afterwards fixed by agreement between the parties, a delay of seven years after the building of the road, and until the company had been placed in the hands of a receiver, before taking legal proceedings to enforce a lien for such damages, is not such laches as will bar a recovery by the donor, there being no equitable grounds of estoppel.

* 4. FEDERAL COURTS—FOLLOWING STATE DECISIONS—LACHES.

By analogy to the rule in regard to limitations, federal courts should follow the decisions of a state court as to laches affecting rights relating to the title or possession of realty therein.¹

Appeal from the Circuit Court of the United States for the District of West Virginia.

William P. Hubbard, for appellants.

Henry M. Russell, for appellee.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the district of West Virginia. It arose from an intervention filed by the Reymann Brewing Company in the cause of the Washington Trust Company against the Wheeling Bridge & Terminal Railway Company, and seeks to establish a preferred claim against the property in the hands of the defendant company. This claim is for two separate items,—one of \$2,500, the value of certain property alleged to have been taken by the railway company in constructing its track; the other, of \$600, for failure in fulfilling its contract, while building its track, to pave a certain alley. The Reymann Brewing Company was the owner of certain real property lying in a suburb of the city of Wheeling, called "Manchester." On this property it conducted its business,—the manufacture, brewing, and selling of beer. Upon it were the buildings erected and used for these purposes. This realty consisted of four parcels, separated by streets or alleys from one another. The whole tract is bounded on the east by Warren street, on the west by Wheeling creek, on the north by Seventeenth street, or the city of Wheeling, and on the south by certain property of the heirs of Pebler. The four parcels are numbered 1, 2, 3, 4; No. 1 being the south parcel, and the others following consecutively, making No. 4 the north parcel.

In the year 1889 Judge Cochran, the president of Wheeling &

¹ As to the following of state decisions by the federal courts, see note to *Wilson v. Perrin*, 11 C. C. A. 71, and supplementary note to *Hill v. Hite*, 29 C. C. A. 553.

Harrisburg Railroad, had in contemplation the building of a railroad for terminal purposes of the Wheeling Bridge & Terminal Railroad Company. In order to build this road, it was necessary to have the right of way over and through the lands of the brewing company. In order to promote his enterprise, and to advance his proposal to capitalists, he approached the president of the brewing company, and obtained permission for this right of way. The definite location of this right of way was not fixed, except that it was to be along the creek bank, outside of (that is to say, to the west of) the buildings of the brewing company, so as not to interfere with that company. The president of the company said that this general grant of the right of way was "merely that they should have a good showing when they come East and make the necessary arrangements." When the construction of the railroad actually begun, it was found inconvenient and expensive to go too near the bank of Wheeling creek, and the tracks were laid more to the eastward, and instead of one track, as was at first suggested, several tracks were laid. This change of location was accomplished without any seeming inconvenience to the brewing company, or interference with its buildings on tracts 1, 2, and 3, and the work progressed very well. But on tract 4 the change of location of the track, and certain other changes made necessary by a construction of a bridge over Seventeenth street,—changes made for the convenience both of the railroad company and of the brewing company,—the track was brought so near to an old ice house of the brewing company, and in use by it, as to make it of no practical utility to the brewing company. At first the new location for the track passed through the boiler house attached to the ice house, and this had to be moved. Then the track itself necessitated raising the chutes through which ice was carried to the ice house to such a height that the ice was all broken when delivered, so the old ice house was abandoned by the brewing company, and has since become a ruin, practically having disappeared. This raises the chief issue in this case. The petition intervening gives this account of the transaction, after stating the necessity for a change in the location of the railroad from that first contemplated, and that as a consequence the tracks were brought across parcel No. 4 at such a place and in such manner as to prevent altogether the further use of the ice house and its machinery for the purposes for which they were intended:

"It was thereupon agreed between the said Wheeling Bridge & Terminal Railway Company and your petitioner that the said railway company might have its right of way according to the new location, and might construct its tracks across the said four parcels of land according to the said new location, and in consideration thereof the said railway company agreed that it would at its expense remove the boiler house of your petitioner upon the said parcel numbered one to a point on the said parcel further west than it had theretofore stood, so as to permit the tracks of the railway company to run to the east of it; that it would make certain changes in the bridge owned by the said city of Wheeling, the eastern end of which rested upon the said continuation of said Seventeenth street; that it would, at its expense, pave the alley aforesaid, which lies between the said second and third parcels of your petitioner's land (this alley being a public alley, but having property of your petitioner on both sides of it, and being especially used by your petitioner for access to the creek); that it would cross the last-mentioned alley with its tracks by a bridge having under it a sufficient clearance to

permit the passage of teams; and that it would pay to your petitioner the sum of twenty-five hundred dollars in money. As a part of the said agreement, it was further agreed that your petitioner should convey to said railway company the said ice house on the said parcel numbered four, and the land on which the said ice house was situated, and that with that land it should grant to the said railway company a right of way for persons, horses, and vehicles between that land and Warren street, so that access could be had to the said land from the last-mentioned street." That it has not paid the \$2,500, and has not paved the alley.

It estimates the latter at \$600, and its money demand is for the aggregate of these sums, with interest.

There was only one written agreement between the parties. That is as follows:

"This memorandum witnesseth that the Reymann Brewing Company of Wheeling, West Virginia, in consideration of one dollar paid by the Wheeling and Harrisburg Railway Company of West Virginia hereby grants and conveys to said railway company, its successors and assigns, a right of way for its railway over and along said company's lands situate on the easterly bank of Wheeling creek, in said city of Wheeling, Ohio county, in said state; said right of way to include the strip of land on and along the east bank of said creek from the buildings of said Reymann Brewing Company to the bed of the creek. This grant is accepted by said railway company with the agreement on its part that it shall, in constructing its tracks over said lands, preserve the facilities for storing ice in said company's ice houses, or, if any changes are required therein, they shall be made at the cost of the railway company, and in such wise as not to be less useful and convenient to the brewing company; and any change made in the Seventeenth street bridge shall be such as shall not injure the access to the brewing property, and shall conform to the city ordinance granting a right of way over streets, &c., to said railway company. It is further stipulated that in constructing said road and tracks over said lands the foundations to buildings and to the brick stack shall not be interfered with, and all proper precautions shall be taken to protect said brewery property from injury. Said brewing company agrees to execute such other conveyance as may be necessary to assure to said railway company the right of way hereby intended to be described. Witness the corporate seal of said brewing company, and the attestation of its president, this 25th day of July, 1888, together with the seal and attestation of said railway company by its president."

All that was done afterwards was in parol, and is testified to by the president and by the manager of the brewing company. The railway was completed in 1889. The petition was filed on December 9, 1895. Judge Cochran, who was president of the railway company at the time of this construction, died after this intervention was filed.

The receiver, in his answer to the petition, set up the laches on the part of the brewing company. He also pleaded the statute of frauds to the parol agreements. He denies that there was ever any agreement to pay the \$2,500 for the ice house, or to pave the alley, as alleged, or any other agreement than that set out in writing as above. He avers that the building of the railroad was greatly for the interest of the brewing company, in putting its goods to market, and that this was the real consideration for the grant of the right of way.

On the coming in of the answer, the court referred the cause to a master. He made his report—the finding is in favor of the petitioner—on both claims. He also finds that the brewing company has a vendor's lien on the right of way, and also upon the land on which

the ice house stood; and he gives to the railway company, subject to this lien, this land on which the ice house stood, and a full right of way from it to Warren street. The court approved the findings and conclusions of the master, and ordered the receiver to pay the full sum of money, with interest, in default of which the sections of the road on the land of petitioner must be sold. An appeal was allowed on assignments of error. The decisive questions made in the assignments of error are: Laches; the statute of frauds; the right of the court to require the payment of this judgment out of the assets of an insolvent company, in preference to the mortgage debt; the right of the court to order a sale of a part of the road to pay the judgment, instead of directing the receiver to pay it from the earnings of the road; the right of the court, sitting in equity, to render a money judgment. We will take these questions up in their inverse order.

This proceeding is by intervention in a proceeding in equity. It is brought to enforce a lien on realty in the hands of the court of equity, and in the charge of its receiver. Two questions were involved in it: First, was there any sum of money due to the intervener? Next, was it secured by lien, and, if so, how is this lien to be enforced? Proceeding to the adjudication of these questions according to the established procedure of a court of equity, a reference was to a master, who reported the facts bearing upon both questions. The determination of the first question was essential to the adjudication on the other. The right of the court to ascertain the amount of money due, in the mode adopted, cannot be questioned. It is constantly exercised in the enforcement of the lien by mortgage. The lien of the vendor is substantially a mortgage. *Lewis v. Hawkins*, 23 Wall. 127. It will be observed that this is not the ordinary claim against an insolvent railroad company, praying payment thereof out of funds in the hands of, and under the control of, the receiver. It is the assertion of a lien superior to the lien under which the receiver was appointed, and in every respect paramount to him. In this respect the case at bar differs entirely from *Gue v. Canal Co.*, 24 How. 263. How the lien, if it be established, shall be enforced is a question for the court. As it would cover a very important part of the road, and its control by the receiver is essential to the keeping the road a going concern; the court may well conclude that the whole property is interested in preserving it, and so the general fund could be used in extinguishing the lien. If there be funds on hand, the result of earnings, they could be used. If the property is so insolvent as to produce no earnings, provision may be made for the extinguishment of the lien out of the proceeds of sale, so as give a good title to the purchaser. The sale of the part of the road covered by the lien would be resorted to only in the last extremity. But, if reduced to this necessity, the court could order it. *Lewis*, Em. Dom. § 620; *Finnell v. Railway Co.* (Ky.) 36 S. W. 553; *Varner v. Railway Co.*, 55 Iowa, 677, 8 N. W. 634; *Hobbs v. Trust Co.*, 30 U. S. App. 393, 15 C. C. A. 604, and 68 Fed. 618. It is not a question of a preferential claim, in the sense of a claim having superior equities to the mortgage debt. It is the payment of the claim which outranks the mortgage, independent of it, unaffected by the proceedings for foreclosure.

It is earnestly contended that the case is one for specific performance, and that the statute of frauds operates as a bar to it. But the case as made is the grant of the right of way by the brewing company to the railroad company, the occupation of it by the latter, and its constant and daily use. For this the railroad company was to pay the money claimed. This is a case in which one party has nothing to do but to execute a deed, and the other to pay the money. Had the contract been in parol, for the exchange of lands, and one party had put the other in possession, a specific performance would have been decreed. *Bigelow v. Armes*, 108 U. S. 10, 1 Sup. Ct. 83. The language of the supreme court in *Railway Co. v. McAlpine*, 129 U. S., at page 312, 9 Sup. Ct., at page 288, is appropriate to this case:

"The taking possession of (that is, exercising control and dominion over) the property was referable entirely to the contract. It was an act done with respect to the property by the consent of the vendor, which would not have been done if there had been no contract. This consent gave to the act, which otherwise would have been tortious, its character as one of part performance."

But it is by no means clear that the case of the intervener rests on a parol contract or contracts. The memorandum of 25th July, 1888, giving the right of way over the lands of the brewing company, has this acceptance of the grant by the railway company:

"This grant is accepted by said railroad company with the agreement on its part that it shall, in constructing its tracks over said lands, preserve the facilities for storing ice in said company's ice houses, or, if any changes are required therein, they shall be made at the cost of the railroad company, and in such wise as not to be less useful and convenient to the brewing company."

The memorandum also, in its general provisions, says:

"All proper precautions shall be taken to protect the brewery property from injury."

Evidently this memorandum contemplated changes in the location of the tracks. The prominent idea was the right of way over the lands. There were changes in the precise location of the tracks on parcels 1, 2, and 3. These are not denied. When the result of these changes appeared on parcel No. 4, it was discovered that it made the ice house on that parcel useless, and destroyed the facilities of getting ice into the house, and from the creek. The railway company could have made the changes required thereby. But the evidence shows that these would have been costly and troublesome, so far as the ice house was concerned; and, instead of making them, the company preferred to pay the money, \$2,500, and it agreed to make a necessary change for facilitating the getting of ice from the creek by paving the alley, at a cost of \$600. The case of the intervener rests on this written agreement. The parol evidence is as to the measure of damages.

It is also insisted that the intervener has been guilty of laches, and so has lost its right. Now, the case, as made, is the entry upon and the use of the right of way by the railway company, under a contract that, in constructing its tracks over the land, it shall preserve the facilities for storing ice in said company's ice houses, or, if any changes

are required, then they shall be made at the cost of the railway company, and in such wise as not to be less useful and convenient to the brewing company; that in putting in the tracks it became evident that the old ice houses would be made useless, and the road on the creek bank destroyed; that, to supply their place, \$2,500 be paid for the ice house, and the alley paved, at a cost of \$600. This was the price to be paid for the right of way, and the brewing company had a lien therefor. *Lewis v. Hawkins*, 23 Wall. 127, likens possession subject to a vendor's lien to possession subject to a mortgage. The possession is not adverse. *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. 771. And this is the law in West Virginia. *Poe v. Paxton*, 26 W. Va. 607; *Norman v. Bennett*, 32 W. Va. 614, 9 S. E. 914; *Steenrod v. Railway Co.*, 27 W. Va. 1. The federal courts follow the decisions and law of the state as to the statute of limitations (*Dibble v. Land Co.*, 163 U. S. 65, 16 Sup. Ct. 939), and, by analogy, should follow them as to laches. This is a question affecting the title and possession of real property, in which federal courts follow the state courts. *Bucher v. Railroad Co.*, 125 U. S. 583, 8 Sup. Ct. 974. Apart from this, on general principles, there has been no such laches as will deprive the petitioner of his rights. The legal title was in the brewing company. The railway company had an equity. The latter had quite as much interest in perfecting the transaction as the former had. The transaction took place in 1888. The railway company went into the hands of a receiver in 1893. This intervention was filed in 1895. The mortgage was dated 1889. "The length of time during which the party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the statute of limitations, subject to an arbitrary rule. It is an equitable defense, controlled by equitable considerations; and the lapse of time must be so great, and the relations of the defendant to these rights such, that it would be inequitable to prevent the plaintiff now to assert them." *Halstead v. Grinnan*, 152 U. S. 413, 14 Sup. Ct. 641. So in *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873: "Laches does not, like limitation, grow out of the mere passage of time. It is founded on the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relation of the property or the parties." Nothing of this kind exists here. The brewing company generously granted a right of way to the railway company through its lands; stipulating only that the railway company should not injure its facilities, and, if it made changes, these should be done at the cost of the railway company, and in such wise as not to be less useful and convenient to the brewing company. The railway company accepted the grant with this stipulation, and went into and remains in possession of the rights of way. It did make changes which destroyed facilities for storing ice. The money value of these changes has been fixed. The inequity would be in leaving the railway company in full possession, and depriving the brewing company of all indemnity.

The decree below provides for the execution of a deed by the brewing company. This company assigns no error in that respect. The

judgment of this court is that the cause be remanded to the circuit court, with instructions to take such proceedings therein as will conform to this opinion.

INDIANAPOLIS GAS CO. v. CITY OF INDIANAPOLIS.

(Circuit Court, D. Indiana. November 19, 1898.)

No. 9,493.

1. DISCOVERY IN EQUITY—POWERS OF FEDERAL COURT.

The power of a federal court of equity to entertain a cross bill for discovery in a suit in equity has not been abridged by any act of congress or rule of the supreme court, and is not superseded by statutory methods provided for obtaining facts in actions at law.

2. SAME—CROSS BILL AGAINST CORPORATIONS.

It is not a sufficient reason for a corporation to refuse to answer a cross bill against it for discovery that its officers and employes are made competent witnesses for either party by the federal statutes, such testimony not being the exact equivalent of a discovery by the corporation itself.

3. SAME—RIGHT OF DEFENDANT TO DISCLOSURE—MATTERS GOING TO PLAINTIFF'S TITLE.

In a suit by a gas company against a city to enjoin the enforcement of an ordinance fixing the price of gas on the ground that its effect is to take the plaintiff's property without just compensation, the plaintiff cannot refuse to answer a cross bill for discovery on the ground that the evidence called for relates to matters which it would be required to prove to establish its case, and is, therefore, evidence going to plaintiff's title, where such matters affect the question of the validity of the ordinance which constitutes defendant's title, and the validity of which is affirmed in its answer.

On Demurrer to Cross Bill for Discovery.

Ferd Winter, for complainant.

John W. Kern, for defendant.

BAKER, District Judge. The Indianapolis Gas Company, on August 11, 1897, filed its bill of complaint, setting up in great detail the fact of its organization, and the character and extent of the business that it carried on; alleging that it conducted both an artificial and a natural gas business in said city; alleging that the city of Indianapolis had adopted an ordinance, which is set out in the bill, fixing the price of artificial gas to be furnished to the city and its inhabitants at 75 cents per 1,000 cubic feet, and alleging that the price so fixed is unreasonable, and amounts to a taking of the complainant's property without just compensation, and without due process of law; and praying for a temporary restraining order pending the suit, and on the final hearing for a perpetual injunction restraining the enforcement of said ordinance. On this bill a temporary restraining order was granted until the final determination of the cause. On February 21, 1898, the defendant, the city of Indianapolis, filed an answer denying most of the material allegations of the complainant's bill, and affirming the validity of the ordinance in question, and asserting that the price fixed thereby was a reasonable price, and would afford a fair compensation to the complainant for the expense of manufacturing and supplying artificial gas to its consumers. At the same time it filed a

cross bill against the gas company, referring to the answer of the defendant as well as to the bill of complaint for a detailed statement of the facts involved in the suit, and insisting on the validity of the ordinance, and seeking by interrogatories propounded to the defendant in the cross bill to obtain evidence to show that the ordinance was valid on the ground that it did not amount to a deprivation of property without just compensation, nor without due process of law. The gas company has interposed a demurrer to the whole cross bill, and severally to each interrogatory contained therein.

While bills of discovery in aid of the prosecution or defense of actions at law have practically fallen into disuse, owing to the simpler methods provided by statute for obtaining the same facts which might have been originally obtained by such cross bills, still it seems to be certain that courts of equity have not been deprived of their original and inherent jurisdiction to entertain bills of discovery by reason of such statutory provisions. The most that can be said is that these statutes have provided a cumulative remedy for obtaining evidence of facts which, before the enactment of such statutes, could only be obtained by a bill of discovery. The court knows of no statute enacted by congress, nor of any rule promulgated by the supreme court, which abridges or denies the original jurisdiction of courts of equity to entertain bills of discovery. However, bills of discovery in aid of the prosecution or defense of an action at law will be of very rare occurrence, for the reason that the statutes provide a simpler, cheaper, and more expeditious method of obtaining the facts than does a bill of discovery. So far, however, as a cross bill for discovery in a suit in equity is concerned, I am not aware that any change has been effected, either by statutory enactment or by the rules of the supreme court. A corporation aggregate is bound to answer a bill of discovery the same as a natural person, except that it puts in its answer under its corporate seal, while a natural person makes answer under oath. While it is the usual practice to join the clerk or other principal officer of a corporation aggregate as a party to the suit in a bill for discovery, such joinder is not necessary. Where a corporation is the sole party defendant, it is its duty, if required to do so by the bill, to put in a full, true, and complete answer; and to enable it to do so it must cause diligent examination to be made of all deeds, papers, writings, and muniments in its possession before answering. It was said by Sir John Leach, M. R., in *Attorney General v. Burgesses of East Retford*, 2 Mylne & K. 40, that if the corporation aggregate pursue an opposite course, and the information is afterwards obtained from documents referred to in its answer, the court will infer a disposition on the part of the corporation to obstruct and defeat the course of justice, and on that ground will charge it with the costs of the suit. Nor is it a sufficient reason for the corporation to refuse to answer a cross bill for discovery that the officers and employes of the corporation are made competent witnesses for either party by the federal statutes. Whatever force this suggestion may be entitled to where a discovery is sought from a natural person, it has none in such a case as the present, for the corporation cannot be sworn and examined as a witness, and it is apparent that in many cases a discovery by

a corporation may be more beneficial and important to the attainment of the ends of justice than would be a reliance exclusively upon the examination of its officers and employes. In the present case the corporation is alleged to be possessed of the knowledge of facts essential to the maintenance of the defense which the defendant does not possess, or which it cannot so readily or satisfactorily acquire as by obtaining a discovery through the answer of the corporation. It is clear that the examination of the officers and employes of the corporation can in no event be the exact equivalent of a discovery by the corporation itself. *Bank v. Heilman*, 66 Fed. 184.

It is earnestly contended by counsel for the gas company that the cross bill seeks to obtain evidence touching the same matters of fact which must be established by the complainant in the original bill to make out its case. It is said that this cannot be done, as it would be to allow the defendant to obtain evidence touching the complainant's title. The court does not so regard it. The city exhibits as its title and right of defense the ordinance which is assailed in the original bill. The facts which are sought by the cross bill are evidence in support of the defendant's title, which rests on the ordinance. While the evidence to assail and the evidence to support the ordinance is coincident, because the same facts are important to each party, the court is not of opinion that evidence touching these matters is evidence touching the title of the complainant in the original bill in such sense as that the city is not entitled to an answer from the gas company in regard to the facts affecting the validity of the ordinance which are peculiarly within its knowledge. Every plaintiff is entitled to a discovery from the defendant of the matters charged in the bill, provided they are necessary to ascertain facts material to the merits of his case, and to enable him to obtain a decree. The plaintiff may require this discovery either because he cannot prove the facts, or in aid of proof, and to avoid expense. *Mittf. & T. Pl. & Prac.* pp. 393, 394. It would therefore seem to be clear that the complainant, in its original bill, if it had chosen to do so, might have propounded interrogatories to the city for the purpose of obtaining the admission of such facts as would have tended to support the allegations contained in its bill. If the complainant in the original bill possessed the right to obtain a discovery from the defendant touching matters of fact set up in its bill, it is not apparent why the defendant to that bill may not, by a cross bill, obtain a discovery from its adversary touching the same matters. If the defendant to the original bill may not obtain a discovery from the complainant touching such matters, then it would result that a court of equity, which delights to do equal and impartial justice, would be compelled to concede a right to the complainant which it denied to the defendant. The cases in which it is said that the defendant will not be permitted to inquire into the title of the complainant, nor be entitled to compel the complainant to make disclosure of its title, are cases where the defendant has no direct interest in the muniments of title of the complainant. Such is not the case here. Here the complainant assails the defendant's title; charges that it is invalid by reason of certain facts, which it has set up in its bill. This the defendant denies, and

asserts the validity of its title under the ordinance. And why may it not compel the defendant to the cross bill to disclose facts touching that question? In the opinion of the court, it may do so. "It has been well remarked," observes Mr. Justice Story in his Equity Pleading (section 390), "that in the transactions of human life it frequently happens that the leading facts of the case are known only to the acting parties; and it is, therefore, of essential service to the cause of truth and justice that the defendant to the suit should be enabled to interrogate the plaintiff on his oath as to the subject-matter in dispute between them. The cross bill, therefore, gives a perfect reciprocity of proof to each party, derivable from the answer of each. And on this account the right to file a cross bill is not confined to cases between private parties, for, if a foreign sovereign brings a bill, the defendant may file a cross bill against him for the discovery of matters material to his defense."

The case of *Young v. Colt*, Fed. Cas. No. 18,155, cited by counsel for the defendant to the cross bill, seems to be an authority against his contention. In that case a bill was filed by the patentee for the infringement of a reissue of his patent. The answer of the defendants to the original bill denied that the patentee was the first inventor, or had acquired a valid patent. It is to be observed that the defendants in the original suit did not make their defense in their answer, or file their cross bill, under any color of title. They neither claimed to be prior inventors, nor to hold by assignment the elder right of any other person. If not naked intruders or trespassers upon the title of the patentee, they stood upon no higher ground than the allegation that the grant of the government to the patentee was void, and they presented their cross bill to support that assertion. It was held in this case that a cross bill for such purpose was not admissible. The court said:

"The broad principle upon which a cross bill is allowed is that equity should give suitors a common advantage in its processes. As it compels the defendant to make disclosures and discoveries under oath to aid an action against him, so should it secure mutuality in this privilege by allowing the defendant to become a plaintiff, and compel his adversary to make disclosures and discoveries of matters within his knowledge that are serviceable to the defense. The parties to that end alternate places in order that each may have the same use of the powers of the court for the same object. But a cross bill, as its name imports, goes no further than to give the party filing it a reciprocal right enjoyed by the complainant in the original bill in respect to their mutual title or interest in the subject-matter of the suit."

The court further said:

"Considering the cross bill in this case as a bill of discovery, the defect is vital to it that it rests on no title in the parties filing it, either in common with or hostile to the patentee. It is contrary to all principles of equity pleading to permit a party who has no right himself to a subject-matter in dispute to subject the one who shows a *prima facie* title to it to interrogatories as to the source or validity of that title. Bills framed on that ground are always rejected as fishing, or as attempts to pry into an adversary's title, and as transcending the privilege granted to a suitor to draw from his adversary facts tending to support his own title."

In the present case the title of the defendant rests upon the validity of the ordinance, and the title of the complainant to recover

rests upon a defect of title under such ordinance. Each party, therefore, has a common interest in the question of the validity or invalidity of the ordinance in suit; and, in my judgment, either party has the right by interrogatories to compel the other to make disclosures and discoveries in regard to the facts of the case to aid such party in reaching the ends of truth and justice.

Nor does the contention of the demurrant receive any support from the case of *Leggett v. Postley*, 2 Paige, 599, which was a bill of discovery filed in aid of a defense in an action at law. It was there correctly decided that the defendant could not be compelled to make disclosures which, if true, would subject him to a criminal prosecution; nor could a discovery be compelled merely to guard against anticipated perjury in an action at law. It was further held that, to sustain a bill of discovery filed in aid of a defense in an action at law, the complainant must show that the discovery was material, and also that his defense at law could not be established by the testimony of witnesses without the aid of the discovery which he sought. This latter proposition is unsound. *Williams v. Wann*, 8 Blackf. 477, and cases there cited. No principle correctly decided in *Leggett v. Postley*, supra, lends support to the demurrer to the cross bill.

The question in *Bolton v. Corporation of Liverpool*, 1 Mylne & K. 88, arose on a bill of discovery filed in aid of a defense to an action at law brought by the corporation for the recovery of town dues, which the defendants, by their answer, admitted that they had in their custody; and, relating to the matters mentioned in the bill, they also admitted that they had divers cases which had been prepared and laid before counsel in contemplation of the then pending litigation, as also certain grants and deeds, which were the title deeds and grants evidencing their title to the dues in question. It was held that the plaintiff had no right to the inspection of such deeds and documents, because the plaintiff had no common interest with the defendants in the deeds and documents in question; and it was further held that the cases laid before counsel in the progress of a cause, and prepared in contemplation of and with reference to an action or suit, cannot be ordered to be produced for the purposes of that action or suit. Neither question decided in the foregoing case is influential in the present case, because here both parties had a common interest in the matters of which discovery is sought.

The case of *Ivy v. Kekewick*, 2 Ves. Jr. 679, fairly discloses what is meant by a fishing bill. The bill alleged that the testator had, after making his will, contracted for the purchase of an estate; that the purchase was completed by his executor, who conveyed to the testator's son, who was in possession; that the plaintiff was heir ex parte materna, and that there was no heir ex parte paterna. The defendant, by his answer, claimed as heir ex parte paterna. The plaintiff, by the amended bill, prayed that the defendant might set forth in what manner he was heir ex parte paterna, and all particulars of his pedigree, and the times and places or particulars of the births, baptisms, marriages, deaths, or burials of all the

persons who shall be therein named. To this part of the amended bill a demurrer was filed and allowed, because it was a fishing bill, seeking to know how the defendant would make out his own title, and the facts so alleged, and of which discovery was sought, constituted no part of the plaintiff's case. They were matters of defense exclusively, having no relation to the plaintiff's case. It was not, as here, a case where each party had a common or mutual interest in the same title. On the whole, the court is of opinion that the demurrer to the cross bill ought to be overruled, and the defendant therein should be ruled to answer. So ordered.

SIMONDS ROLLING-MACH. CO. v. HATHORN MFG. CO. et al.

(Circuit Court, D. Maine. July 30, 1898.)

No. 487.

1. PATENTS—LIMITATION OF CLAIMS—FORMS AND PROPORTION.

It is of little consequence whether the relative dimensions of parts of a device are gathered from a scale expressly shown, or from the apparent proportion indicated by drawings without a scale; and, in either event, the dimensions shown are not to be taken as elements in the claim, unless the patentee has expressly limited himself within the rules stated by the circuit court of appeals for the First circuit in *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958.

2. SAME—ANTICIPATION.

- An inventor is entitled to be protected to the extent of what he practically accomplishes, and no more, and anticipatory matter which has never gone into practical use is to be narrowly construed.

3. SAME—PATENTABLE METHOD OR ART.

A method of making rolled-metal forgings that are circular in cross-sectional area, by means of dies used in pairs, and moved in opposite directions over the metal to be shaped, *held* to be patentable as an "art" in that it involved the application of knowledge or science to effect a desired practical purpose, and did effect it.

4. SAME—CAR-AXLE DIES.

The Simonds patent, No. 319,754, for improvements in faces for car-axle dies, *held* not anticipated by the Bundy English patent, of May 1, 1806, for "machines or instruments for making leaden bullets and other shot"; and also *held* valid and infringed as to claim 1.

5. SAME—METHOD OF MAKING ROLLED-METAL FORGINGS.

The Simonds patent, No. 419,292, for a method of making rolled-metal forgings that are circular in cross-sectional area, *held* to show patentable invention over the Bundy English patent, of May 1, 1806, and over Simonds' earlier patent, for improvements in faces for car axles (No. 319,754); and also *held* infringed.

6. SAME—INVENTION.

The difficulties arising under the expressions of the supreme court in *Lock Co. v. Mosler*, 8 Sup. Ct. 1148, 127 U. S. 354, and in *Underwood v. Gerber*, 13 Sup. Ct. 854, 149 U. S. 224, with reference to the issuing of independent patents for a machine, an art, and a product, involved in the same fundamental invention, do not apply to the present case, because Simond's second patent clearly showed invention over his earlier patent.

Fish, Richardson & Storrow, for complainant.

Phillips & Anderson, for defendants.

PUTNAM, Circuit Judge. This bill is brought on the two claims of a certain patent, applied for on June 16, 1884, and issued on June

9, 1885, to George F. Simonds, and on a patent, which contains only one claim, applied for by the same George F. Simonds on March 24, 1885, and issued to him on January 14, 1890. It may be of importance to note here that, although the earlier patent issued several years before the later one, yet the application for the later one was filed while the earlier one was pending in the patent office.

The introductory part of the earlier patent claims that Simonds had invented "certain improvements in faces for car-axle dies designed to be used in pairs," and the specification describes the alleged invention as follows:

"My invention relates to die faces which are moved in opposite directions over the metal to be shaped, the blank rotating on its axis between them. My invention consists in dies designed to be used in pairs, and provided with forming surfaces raised upon the plane face of the die, and with reducing and spreading surfaces running diagonal to the line of movement of the die, and standing oblique to the plane of the die."

The claims in that patent are as follows:

"(1) Dies adapted to form metal articles circular in cross-sectional area, with the working parts raised upon a plane surface, and provided with forming surfaces running in line with the movement of the die, to give the shape required, and diverging reducing and spreading surfaces to force the metal laterally, substantially as described.

"(2) Dies adapted to form metal articles circular in cross-sectional area, having forming surfaces to give the shape required, and reducing and spreading surfaces to force the metal laterally, provided with corrugations or irregularities, to engage the mass of metal and insure its rotation, substantially as set forth."

In the introductory paragraph of the later patent, Simonds claims to have invented "certain improvements in methods for making wrought-metal forgings that are circular in cross-sectional area"; and in the specification he states: "My invention consists in a novel method of making wrought-metal forgings which are circular in cross-sectional area."

The claim is as follows:

"The method herein described of making rolled-metal forgings by acting upon all parts of a metal bar in spiral lines, so as at each part in succession and upon such lines to cause the bar to rotate and to strain and spread the metal axially and compress it to the required shape and size."

The specification states that the various mechanical devices and die faces illustrated and described had been made the subject-matter of various applications for patents, of which five are referred to by the serial numbers of the applications. With the rest is included serial number 135,014, which resulted in the earlier patent in issue here. What various devices and die faces were made the subject-matter of the four other applications has not been called to our attention, and we therefore presume it is of no consequence in this case.

The later patent also states that there was a pending application for the articles produced by the improved method claimed in it; but the history of that application has not been brought to our attention, and we assume that it, also, is of no present importance. We state these facts, therefore, only in order that it may be seen that, pending the application for the earlier patent in suit, Simonds had on file in

the patent office applications for patents for both the product and the method or art to which the patented dies were supposed to relate.

A controversy arises whether or not the later patent for the method or art was valid, in view of the issue of the earlier patent for the dies made use of in the art; but this will be considered in its proper order. Aside from this, the only important question in the case which, in our opinion, requires our attention, grows out of a patent issued in England to William Bundy, on May 1, 1806, in which the patentee briefly describes his monopoly as covering an "invention of machines or instruments for the purpose of making leaden bullets and other shot." It is plain that the machines which Bundy exhibited in his specification concerned only spherical objects, while both the dies and the method or art claimed by the complainant in this case have a much broader range. Nevertheless, the underlying principle of all that Simonds patented is involved in connection with the production of spheres, and he makes use of the mechanical laws of the Bundy dies; but he also makes use of the laws of physics by virtue of which his dies, while forming the sphere, produce, in addition, a "forged surface," in the technical sense of the term. None of these laws are explained in Simonds' specification, which is of no legal consequence, because an inventor is not deprived of the fruits of his genius by the fact, if it exists, that he is neither a mathematician nor a physicist. Nor are the laws properly expounded in any portion of the proofs which have been called to our attention. We will not attempt to explain them ourselves, nor to describe categorically or technically the elements of the dies used by either Bundy or Simonds for forming spherical objects. We will endeavor, however, to make up from Simonds' specifications a sufficiently practical explanation of them, leaving the mathematical and physical principles which they involve to be worked out by those who are curious to do so.

The dies are in pairs, reciprocating face to face, commencing their movement at the vanishing points to which we will refer. Into the face of each die is cut a depression, which begins at a vanishing point at one extremity, and at the other extremity exhibits a cross section which is half of a cylinder, or, as expressed in Simonds' specification in his later patent, "about" half. From the vanishing point at one extremity to the other extremity, the die face is said by Simonds, in the same specification, to gradually deepen and spread until it reaches the other extremity, where, as said, the cross section is half of a cylinder, or thereabouts. In Bundy's specification he says, in substance, that, when the two dies have been moved from right to left, so that their work is complete, they form, "when close together at the two extremes," "a complete cylindrical hole, the diameter of the ball intended to be made." As already said, Bundy had in contemplation only the shaping of spheres; but Simonds, in his earlier patent, as expressed in his claims, had in contemplation the shaping of various "metal articles circular in cross-sectional area"; and he exhibited, in his drawings attached to his specification, dies adapted to the rolling of car axles, and no other dies. It is evident that he had these particular dies primarily in contemplation, and this even

to the extent of the fact that he made no allusion whatever to spherical objects until he drew his specification for his later patent.

While it is impossible to controvert successfully that, so far as the mere shaping of articles is concerned, the entire underlying principle of Simonds' dies is found in Bundy's, nevertheless it cannot be denied that, so far as concerns articles other than spheres, there was invention in broadening out the application of the principle made by Bundy so as to cover such other articles; so that, so far as this case relates to boot calks, which, in whole or in part, are circular in cross-sectional area, with or without the matter of forging, Simonds' patents involved invention, and have been infringed. There must therefore be a decree in favor of the complainant, so far as such boot calks are concerned, on one or both of the complainant's patents, to the extent that all the defendants are joint infringers, and no further. On whether both or one, and, if on but one, then on which, depends on principles to be further discussed. So far as the earlier patent is concerned, however, this infringement must, in any event, be limited to the first claim, because, in view of the fact that this claim must be accepted as the broad one, the rules of construction require that the precise location of the corrugations found in the second claim, and described in the specification referred to by that claim, be construed as a strict limitation, for which the location of the corrugations, as used by the defendants jointly, cannot be, under such rules of construction, received as an equivalent.

Notwithstanding the apparent concession of the counsel on each side that the complainant's earlier patent covers dies for making spheres, the court, which, with reference to questions so far affecting the public as those of the validity and construction of patents, is not bound by the stipulations of parties, cannot accept this conclusion, in view of the evident insufficiency of the specification to reach anything beyond what is expressly described in it. As we have already said, there is nothing in Simonds' earlier patent to show that the patentee had in contemplation dies for shaping any structures except car axles, and perhaps other like structures, or that he had any conception of the underlying laws which govern the operation of his dies, or that he had any conception that those laws, when broadly applied, would embrace the production of spheres. Except for one to whom those laws are familiar, and perhaps even for him, the passage from the production of car axles to spheres apparently involved invention; and while it is the ordinary rule, often stated, that a patentee is entitled to claim all the uses and advantages which belong to his patent, whether foreseen by him or not, yet this is limited so as to exclude uses which require the further exercise of the inventive faculty, and uses the means for accomplishing which are not so indicated in the specification as to make them available to persons of ordinary skill in the art. This specification contains no hint of the general laws governing the operation of this class of dies, nor anything from which a person of ordinary skill in the art could pass from the production of car axles to spheres. Therefore Simonds' earlier patent cannot be regarded as anticipatory of any subsequent device of

some other person adapted to the production of spheres; and it follows, axiomatically, that the production of spheres cannot be held to be an infringement of it. The mere fact that the claims are so broad that, by a literal interpretation, they relate to every metal article circular in cross-sectional area, does not, under the circumstances, meet this difficulty; because, by well-settled rules, it is not enough that a patent suggests an object to be accomplished, if it does not also point out practically the means for its accomplishment. No authorities are needed in support of this proposition; but, as an apt illustration of it, we refer to the familiar case of *Gordon v. Warder*, 150 U. S. 47, 50, 14 Sup. Ct. 32. There the court said that although the specification contained a paragraph expressly stating that it might be advantageous, in some cases, to accomplish a certain result, yet, inasmuch as no means were provided, or method pointed out, whereby the result could be reached, the specification was ineffectual in this particular. Therefore, we think, we may safely conclude, so far as the production of spheres is concerned, to lay Simonds' earlier patent out of the case, and, further, that in no event can that patent concern the case at bar, except to the extent that the dies, so far as used by defendants jointly for the production of boot calks, infringe its first claim.

Before proceeding further with the case, it is necessary to understand exactly what was Simonds' underlying invention, and how far it is represented by each of the two patents in issue here. In the specification of the later patent, Simonds states what we have already quoted,—that his invention consisted “in a novel method of making wrought-metal forgings which are circular in cross-sectional area.” Also, he states that, by the aid of his method, he is enabled to produce forgings with great rapidity, and accurately, and that he secures in the finished forgings a compacted exterior. This specification shows throughout that it relates to forgings, in the proper sense of the word; and, at every point where it refers to the product of the method patented, it uses the expression “rolled-metal forgings,” “wrought-metal forgings,” or “metal forgings.” It makes no claim that the invention covered by the patent applies to anything else. It would be impossible, in view of the clear language of the claim,—that is to say, “the method herein described of making rolled-metal forgings,”—in connection with what appears at all points throughout the patent, to hold that anything would infringe which merely shaped metal articles, especially those made from plastic metal like lead. It is also apparent that the patent throughout relates to the production of forgings of the character described, through proper dies, with the great rapidity with which ordinary forgings are produced through power rolls, and of a uniform forged surface. In addition, the specification expressly covers spheres, and points out in detail the manner of producing them, with proper forged surfaces.

There has been much discussion at the bar in connection with the words in the claim of this patent, namely, “by acting upon all parts of a metal bar in spiral lines.” It is said by the defendants that this is a mere statement of the mathematical consequences of the operation of the diverging edges of the grooves in the dies. This is undoubtedly true; and, very likely, it is to be taken as another evi-

dence of the fact that the mathematical and physical laws governing the production of forgings by the Simonds method were not understood by him, or by whosoever drew his application, at the time the application was made. The words quoted, are, however, of no importance, because the claim contains the additional words "herein described," which, for the purposes of this case, in law, if not in mechanics, so limit the words "by acting upon all parts of the metal bar in spiral lines" that the one expression becomes, for this case, the equivalent of the other. The words "herein described" are more positive in their effect than the ordinary expression "substantially as described," or "substantially as set forth"; and even this expression in many cases is held to limit a claim, and also sometimes to save it. *Westinghouse v. Power-Brake Co.*, 170 U. S. 537, 558, 18 Sup. Ct. 707. At any rate, the words discussed, which state a mere mathematical truism, may clearly be rejected as surplusage, as the words "herein described," in connection with the careful details of the specification, are ample for all the practical purposes of the patent law.

On the other hand, there is nothing in Simonds' earlier patent which properly suggests the invention shown by his later one, in relation to forging the surface of the metal articles to be produced. It is true that the later patent contains the reference which we have already cited, to an application for a patent for the die faces; but this expression is too general to operate as a legal construction of the earlier patent, even if that patent could receive construction from that source. It is also true that the title of the earlier patent uses the word "forging"; but the description of the alleged improvement in the introductory part of the specification, already cited by us, has no relation to any such result. It is also true that the specification contains the words "heated bars, ingots, or fagots"; but this expression may be used with reference merely to shaping, and without reference to forging. There are also found in the specification the words "plastic metal," and both claims of the earlier patent, by their express terms, relate to all metal articles, which expression includes, of course, those made of plastic metal, while the claim in the later patent is limited in express terms to "rolled-metal forgings." It is also true that the patentee shows car axles in the drawings of the earlier patent, and they are especially enumerated in his specification. These, of course, could not be made of anything except iron or steel in condition to be forged or rolled. Nevertheless, taking Simonds' earlier patent altogether, it contains nothing which would justify the court in holding that it does not cover all metals capable of being shaped by dies, or that it in any way concerns the subject-matter of procuring a proper forged surface, so fully treated of in his later one. Necessarily, the fact that the earlier patent covers a field broader than forgings excludes from its purview the function of obtaining a forged surface.

The title of the earlier patent, to which we have already referred, and the history of this subject-matter in the patent office, indicate that the valuable element of Simonds' invention, namely, procuring a forged surface by the use of power dies of the character described, dawned on him after that patent was applied for, and that, when the

application for it was filed, the valuable conception exhibited by his later patent had not taken shape in his mind. However this may be, it seems clear that, according to the legal rules of construction, there is not enough in all the incidental expressions of the earlier patent to overcome the more positive ones by virtue of which it relates to the shaping of all metals, including those nominally plastic, and that, therefore, it wholly fails to indicate the invention of which the later patent is the exponent.

It does not appear that the Bundy device was ever put to practical use; and, from the time of Bundy to the time of Simonds, dies constructed according to the mechanical laws covering those of both inventors, so far as shaping various articles are concerned, are not found in the art. Bundy had been buried for more than three-quarters of a century when Simonds gave the world his later patent, which admittedly revolutionized the art of the production by power of articles circular in cross-sectional area. It would be strange, indeed, if a patent like that of Bundy, buried so long as his, and originating when forging by power rolls and power dies was unknown, could be held to anticipate so important an advance on the subject-matter of forging by power as the invention of Simonds, expressed in his later patent.

We do not find it necessary to consider at any length whether or not Bundy's dies were of commercial use, or were ever practically applied. As said by the court of appeals for this circuit in *Packard v. Lacing-Stud Co.*, 16 C. C. A. 639, 70 Fed. 66, 67, the circumstances must be very peculiar to call for the application of propositions of this character; and the fact that a device had never been put into practical use falls far short of answering as an equivalent for the fact that, in the eyes of the patent law, it was purely experimental. So, we find it unnecessary to consider whether Bundy sufficiently explained the proportions that his dies ought to assume, because a careful examination of Simonds' patents would show the same lack of definiteness in this particular as found in Bundy's explanations of his alleged invention. The most that Simonds says is that, for spheres, the cross section of the curved surface at the larger extremity is "about a semi-circle," as we have already said; and, further, that, in order that the die faces may work to the best advantage, the diverging angles of the raised surfaces should bear such a relation to the width and pitch of the faces as to prevent the unworked part of the metal from overlapping, and so forth. One expression in Simonds' specification, as well as his drawings, indicates, though not positively, that the edges of the dies diverge obliquely,—that is, on tangents; but whether or not in practice they so diverge, or whether their divergence is that represented by the equation of an oblique section of a cylinder, and, if yes, of what section or sections, and whether or not this should vary in accordance with the size of the sphere or other article to be rolled, is not made clear by either Bundy or Simonds, and is evidently left to the judgment of those who are practically skilled in the art. In this respect, Simonds, certainly, as well as Bundy, is within the expressions of the supreme court in *Cohn v. Corset Co.*, 93 U. S. 366, 376. In all this there appears to be an equal indefiniteness on the part both of Bundy and of Simonds, subject, in each case, to apparent

criticism and necessary explanation; and yet, in each case, there is not sufficient evidence in the record to justify the court in finding that this indefiniteness would not be overcome by mechanics of ordinary skill, with reference, in each, to the practical purposes pointed out by the patent. The mere fact that Bundy expressly shows a scale is not of a controlling character with reference to questions of this nature, for it is of little consequence whether the relative dimensions of parts of a device are gathered from a scale expressly shown, or from the apparent proportions indicated by drawings without a scale; and, in either event, the dimensions shown are not to be taken as elements in the claim, unless the patentee has expressly limited himself within the rules stated by the court of appeals in this circuit in *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958. This is not the fact, on the present record, with reference to any of the patents in discussion here. However, the discussion of this question of indefiniteness is only necessary for the purpose of supporting Simonds' patents, because the conclusions which we have reached, as have been expressed in this opinion, and will be further expressed in it, are that Bundy's patent is not anticipatory for any of the purposes of this case.

A pertinent limitation of the effect of Bundy's patent as anticipatory matter was explained by the circuit court for the district of Massachusetts in *Ford v. Bancroft*, 85 Fed. 457, 461, and in the cases there cited, expounding the rule that an inventor is entitled to be protected to the extent of what he practically accomplishes, and no more, and that, in this particular, anticipatory matter which has never gone into practical use is to be narrowly construed; because otherwise, as said by Mr. Justice Brown in *Deering v. Harvester Works*, 155 U. S. 286, 295, 15 Sup. Ct. 118, the effect given to an invention of doubtful utility "would operate rather to the discouragement than to the promotion of inventive talent."

In consideration of the facts which we have stated, it would be in violation of all sensible rules to hold that the Bundy device, which, at the most, had in view only shaping "bullets and other shot" from metal normally plastic, or made plastic, anticipated the very important invention of Simonds, as shown in his later patent, and as we have described it. It is true that the specification of Simonds' patent lacks clearness and definiteness in other particulars than those to which we have referred. Among other things, the complainant maintains that while Bundy exhibited, in connection with the diverging sides of the grooves of his dies, only a cutting edge adapted to operate on a plastic metal like lead, Simonds describes "oblique, diverging, reducing, and spreading surfaces," of which surfaces some are claimed to operate to shape the blank, and others to forge the surface. But it is impossible from the specification, or, indeed, from any portion of the proofs in the record which have been brought to our attention, to discriminate accurately the various elements of Simonds' "surfaces," intended to be represented by the various words, "diverging, reducing, and spreading." Yet, however this may be, it is plain that Simonds not only conceived the idea of forging metal articles circular in cross-sectional area, by methods analogous to those of the

ordinary power rolls producing metal forgings, but that he also devised and exhibited in the specifications and drawings of his later patent a practical, working machine, necessary and competent to accomplish his idea.

Looking at this, we might even assume that Simonds had been, in fact, given the Bundy device and patent, and was familiar with them; and yet it would be too plain to require further exposition that there was enough of the highest merit in what Simonds accomplished and expounded by his later patent, not only over the Bundy device and patent, but also over his own earlier patent in suit here, so far as anything is sufficiently exhibited by it. Even if there were nothing of value in Simonds' "oblique, diverging, reducing, and spreading surfaces,"—as to which we have explained there is a certain indefiniteness,—yet the application of the laws involved in the dies described in Bundy's patent, and in Simonds' earlier patent, to the new use of which Simonds' later patent is an exponent, and the arrangement and exhibition of the mechanism required to accomplish his purpose, would clearly be invention, within the terms of the principles and cases cited by the court of appeals for the First circuit in *Heap v. Tremont & Suffolk Mills*, 27 C. C. A. 316, 82 Fed. 449, 456, et seq.

It is also convenient in this connection to refer to the well-known case of *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670, and to apply the expressions of *Tilghman v. Proctor*, 102 U. S. 707, 711, to the extent of paraphrasing, by saying that, whosoever might have been engaged in making "bullets or other shot" under the Bundy patent, if there were any such, never derived the least hint from any phenomenon which Bundy exhibited, intentionally or accidentally, in regard to the practical methods of producing forged surfaces, shown by Simonds' later patent. If there could be any question of anticipation, it would be as between the Bundy patent and Simonds' earlier patent, and not as between either of them and Simonds' later patent. We have, however, shown that Simonds' earlier patent is not sufficient to cover dies for producing spheres, nor Bundy's patent sufficient to cover dies for producing boot calks circular in cross-sectional area. Therefore, as, on the whole, we are of the opinion that, so far as concerns all the essential issues in this case, there was invention in Simonds' earlier patent over Bundy's device and patent, and invention in Simonds' later patent over both, it is unnecessary for us to consider at length any question of anticipation based on sections 4886 and 4920 of the Revised Statutes.

We have no occasion here to add to the voluminous discussions of the patentability of processes, the last of which is found in *Westinghouse v. Power-Brake Co.*, 170 U. S. 537, 556, 18 Sup. Ct. 707, already referred to. Simonds' later invention comes clearly within the statutory word "art," in that it involved the application of knowledge or science to effect a desired practical purpose, and did effect it; and without involving ourselves in those discussions, or in any attempted exposition of the meaning of the word "method," used by Simonds in his claim, we can perceive no reasonable doubt that the subject-matter of his later patent is within the constitutional provi-

sion, and the legislation of congress intended for the encouragement of meritorious inventors.

The only remaining question on which we need touch grows out of the fact that Simonds was not content with a single patent, but took out the two which are in issue here. It is pressed on us that Simonds' entire invention was covered by the patent which issued the earlier, and that, therefore, the second patent is void. This claim gives opportunities for discussions in several directions; but we need not pursue them, barring, however, the propriety of distinguishing between this case and *Palmer v. Manufacturing Co.*, 84 Fed. 454, 457, decided by the circuit court for the district of Massachusetts. In that case, each of the two patents was really for a machine, the machine in the earlier patent merely needing well-known connections to accomplish the results of the machine in the later patent; so that the two patents were clearly for the same subject-matter. But the case at bar is not one of this kind, as Simonds' earlier patent was clearly for mechanism, and the later one clearly for an art.

For a long time after *Rubber Co. v. Goodyear*, 9 Wall. 788, 796, in connection with *Suffolk Co. v. Hayden*, 3 Wall. 315, 378, if not before the date of the expressions found in those cases, it was understood that an inventor might lawfully divide his invention so far as to take out independent patents for his machine, his process, and his product, provided the applications were all pending before either patent issued, or were pending otherwise under such circumstances as to save him from the abandonment implied in taking out a patent for less than his whole invention. This statement is sustained historically by Judge Colt in *Eastern Paper-Bag Co. v. Standard Paper-Bag Co.*, 30 Fed. 63, although some of the dicta in that case as to presumed abandonment may need modification in view of the later decisions of the supreme court,—among the rest, *Underwood v. Gerber*, 149 U. S. 224, 230, 13 Sup. Ct. 854, and *Deering v. Harvester Works*, 155 U. S. 286, 296, 15 Sup. Ct. 118.

The proposition that independent patents may certainly be taken for the machine, the art, and the product involved in the same fundamental invention, when applications therefor are pending at the same time in the patent office, has been very much embarrassed by the expressions of Mr. Justice Blatchford in *Lock Co. v. Mosler*, 127 U. S. 354, 361, 8 Sup. Ct. 1148, and in *Underwood v. Gerber*, *ubi supra*. In each of those cases it appeared that the various applications were filed at different times in the patent office; yet, although all were pending before any patent issued, only the earlier patent was sustained. In *Lock Co. v. Mosler*, at page 361, 127 U. S., and page 1151, 8 Sup. Ct., Mr. Justice Blatchford observes that, with reference to the patent for the "process or method," which was the later one issued, there was no patentable invention "when it was applied for," in view of the application for the product, which was then pending, but on which a patent subsequently issued. Apparently on this account, as well as, perhaps, for other reasons, the patent for the "process or method" was held to be invalid. Inasmuch as, under the statutes relating to patents, the date of invention is not necessarily

the date of the application, it might, perhaps, well be claimed that Mr. Justice Blatchford fell into an error in this expression. Nevertheless, we would, perhaps, be concluded if the facts were the same; but, in view of the conclusion which we have reached, to the effect that there was invention in Simonds' later patent over anything which preceded it, there is no difficulty in sustaining it, notwithstanding the expressions of Mr. Justice Blatchford to which we have referred, and the decisions of the supreme court in which they resulted, and notwithstanding any question which may be raised whether or not the law will sustain the division of a fundamental invention in such way as to allow distinct patents for a machine, an art, and a product, or for two of them, in the manner which we have stated.

We therefore come to the conclusions that Simonds' earlier patent is valid, and has been infringed, as to the boot calks, with reference to which the defendants may be charged jointly, but not as to spheres; and that Simonds' later patent involves invention over anything which preceded it, including his own earlier patent; and that it has been infringed by the defendants with reference to boot calks and spheres, so far as the defendants may be charged jointly; and a decree will be entered in accordance with these conclusions.

Let there be a decree, under rule 21, in accordance with the conclusions of the court in its opinion passed down this day; all questions of costs being reserved until the final decree.

POSTAL TEL. CABLE CO. v. SOUTHERN RY. CO.

(Circuit Court, W. D. North Carolina. November 9, 1898.)

APPEAL—FINAL JUDGMENT—CONDEMNATION PROCEEDINGS.

In proceedings on a petition for the condemnation of a right of way, a judgment sustaining a demurrer to an answer filed by defendant, which leaves proceedings for the appointment of a commission and the assessment of damages still to be taken by the court, is not a final judgment from which an appeal lies.¹

On Petition for Leave to Appeal. For former report, see 89 Fed. 190.

J. R. McIntosh, for plaintiff.

Stiles & Holladay, for defendant.

SIMONTON, Circuit Judge. The petition for condemnation being before the court, with an answer thereto, the petitioner interposed a demurrer to the answer. The demurrer went to the merits, and was not formal. After argument, the demurrer was sustained. Thereupon, pursuing the provisions of the statute of North Carolina, an order was entered looking to the appointment of commissioners. At this stage the defendant filed its petition for leave to appeal,

¹ As to what decrees and judgments are final, for purposes of review on error or appeal in the federal appellate courts, see notes to *Brush Electric Co. v. Electric Imp. Co.*, 2 C. C. A. 379, and to *Trust Co. v. Madden*, 17 C. C. A. 238, and supplementary note to *Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 28 C. C. A. 482.

accompanied by exceptions and assignments of error. The question is, is this judgment on the demurrer a final judgment? A judgment or decree, to be final, for the purpose of review, must terminate litigation on the merits, so that on affirmance by this court the court below would have nothing to do but to execute the judgment or decree already rendered. *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15. Illustrating this rule, we find in *Insurance Co. v. Adams*, 9 Pet. 571, though the merits of the cause have been substantially decided, while anything, though formal, remains to be done, this court cannot pass on the subject. So, also, in *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. 201, a decree which refers a case to a master to state an account between the parties, upon which a further decree is to be entered, is not final. In *Railway Co. v. Simmons*, 123 U. S. 52, 8 Sup. Ct. 58, a decree establishing the right of a junior mortgagee to redeem from a prior mortgage, but not determining the amount he must pay, or the amount due on the mortgage, is interlocutory. In *The Palmyra*, 10 Wheat. 502, a decree for restitution, with costs and damages, was held not to be final, as the damages were yet to be ascertained. In *Chace v. Vasquez*, 11 Wheat. 429, where a decree for damages was allowed on a libel, and commissioners were appointed to ascertain the amount of damages, it was held that no appeal would lie until the commissioners reported, for it was not a final decree. The matter seems to be settled by *Luxton v. Bridge Co.*, 147 U. S. 341, 13 Sup. Ct. 356. That was a case of condemnation of land. It came up on writ of error, seeking to reverse an order appointing commissioners on petition for that purpose. The court says:

"The case, throughout, from the application of the corporation for the appointment of commissioners to assess damages to the owner of the land proposed to be taken, until judgment upon the award of the commissioners, or upon the verdict of a jury assessing those damages, remains in the circuit court of the United States, and under its supervision and control. The action of that court in this case, as in other cases on the common-law side, is not reviewable by this court by certiorari, but only by writ of error, which does not lie until after final judgment disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments by successive writs of error."

These authorities lead to the conclusion that there is no final judgment in this case. The petition for writ of error is refused.

CITY OF WILMINGTON v. RICAUD.

(Circuit Court of Appeals, Fourth Circuit. November 1, 1898.)

No. 268.

1. APPEAL AND ERROR—PETITION FOR ALLOWANCE—DISMISSAL.

A writ of error is the only mode by which a judgment at law can be brought up for review, but such a writ, properly issued and in the record, will not be dismissed because the petition and order were for the allowance of an appeal, and not a writ of error. The petition and order, while required by proper practice, are not essential to the jurisdiction of the appellate court.

2. SAME—DISMISSAL—BILL OF EXCEPTIONS.

A writ of error will not be dismissed because of the absence of any bill of exceptions, where the only questions in the case are of law, and the errors, if any, are apparent of record.

In Error to the Circuit Court of the United States for the Eastern District of North Carolina.

Motion to dismiss appeal.

E. K. Bryan, for the motion.

H. McClammy, opposed.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. The appellee interposes a motion to dismiss this appeal on the following grounds: (1) That no petition for a writ of error has ever been filed or presented, but instead thereof a petition for an appeal. (2) That no order has been made granting or allowing a writ of error, but the order made allows an appeal. (3) That no bond accompanied the petition, and the bond filed subsequent to the order is without surety. (4) That the citation was issued before any writ of error was allowed or issued.

There can be no question that the only mode of giving this court jurisdiction for the correction of errors in a law case is by writ of error. An appeal cannot have this result. *Brooks v. Norris*, 11 How. 204; *Barry v. Mercein*, 5 How. 103; *U. S. v. Curry*, 6 How. 106. In *Stevens v. Clark*, 18 U. S. App. 584, 10 C. C. A. 379, and 62 Fed. 321, the law is stated. The supreme court and the circuit court of appeals possess no appellate power in any case, unless conferred upon them by act of congress. Nor can such jurisdiction, when conferred, be exercised in any other form or by any other mode of proceeding than that which the law prescribes. Chief Justice Taney held in *Sarchet v. U. S.*, 12 Pet. 143, that an action at law could not be brought to the supreme court by an appeal, but must come up on writ of error; in no other way could the court get jurisdiction. So, also, we have the same conclusion in *Ballance v. Forsyth*, 21 How. 389. See, also, *Chase v. U. S.*, 155 U. S. 496, 15 Sup. Ct. 174; *Nelson v. Huidekoper*, 13 C. C. A. 658, 66 Fed. 616, and 30 U. S. App. 88; *U. S. v. Fletcher*, 8 C. C. A. 453, 60 Fed. 53, and 8 U. S. App. 481; *U. S. v. Tinsley*, 25 U. S. App. 266, 19 C. C. A. 515, and 73 Fed. 369.

In the present case there is a writ of error, and it is in the record. It is true that the petition is for granting an appeal, and an appeal was allowed. But evidently both counsel and court did not understand that the word was used in its technical sense, but only as a review by an appellate court of the action of the trial court; for, when the prayer of the petition and the action of the court thereon were carried out, a writ of error was issued. While it is the practice (and one which should never be departed from) to present a petition to the court when a review is desired, asking for a writ of error or an appeal, as the one or other is the appropriate remedy,

such petition and the order thereon are neither of them absolutely necessary. When the case comes up, the writ of error gives the court jurisdiction. *Ex parte Ralston*, 119 U. S. 613, 7 Sup. Ct. 317. In *Trust Co. v. Stockton*, 18 C. C. A. 408, 72 Fed. 1, it is held that a formal petition for the allowance of a writ of error is not requisite to the vesting of the jurisdiction in the circuit court of appeals. Therefore, when the writ was tested by the clerk of the circuit court, without the filing of any petition therefor, or the allowance thereof by any judge, but the judge subsequently, and within the time limited, signed a bill of exceptions and a citation, held, that this was sufficient to give jurisdiction to the appellate court. *Ex parte Virginia Com'rs*, 112 U. S. 178, 5 Sup. Ct. 421; *Davidson v. Lanier*, 4 Wall. 453. This ground for dismissing the writ cannot prevail.

So also with the other ground,—the absence of a bill of exceptions. The errors complained of are errors, if any, patent on the record. There is no disputed question of fact, nor any ruling on any question of fact. The only question in the case is one of law. No bill of exceptions was necessary. *Plow Co. v. Webb*, 141 U. S. 623, 12 Sup. Ct. 100; *Baltimore & P. R. Co. v. Trustees of Sixth Presbyterian Church*, 91 U. S. 127; *Young v. Martin*, 8 Wall. 354; *Clinton v. Railway Co.*, 122 U. S. 469, 7 Sup. Ct. 1268.

The objections as to the bond cannot be sustained. The bond distinctly states that W. C. McQueens signs as surety. It was approved by the judge on 18th March, 1898, and the citation bears date the same day. The motion is dismissed, with costs.

CITY OF WILMINGTON v. RICAUD.

(Circuit Court of Appeals, Fourth Circuit. November 1, 1898.)

No. 268.

1. **TAXATION—ERRONEOUS LISTING OF PROPERTY BY CORPORATION—ESTOPPEL.**
The action of the cashier of a national bank in giving in to the officers of the city for taxation against the bank a number of the shares of its stock, taxable under the laws of the state to the stockholders, does not estop a receiver subsequently appointed for the bank, but before the tax is paid, from setting up the mistake.
2. **SAME—ACTION TO RECOVER TAX PAID.**
Under a statute of North Carolina which prohibits the issuance of an injunction to restrain the collection of any tax, and requires the payment of all taxes levied, but authorizes the bringing of an action therefor after demand, and their recovery back, if found for any reason invalid or excessive, the fact that a board is provided for the correction of mistakes in tax lists does not exclude the right of action to recover a tax paid, on the ground that the property was listed by mistake.

In Error to the Circuit Court of the United States for the Eastern District of North Carolina.

This case comes up on writ of error from the circuit court of the United States for the Eastern district of North Carolina. The action was at law, and was by stipulation heard by the court without the intervention of a jury. The court below found for the plaintiff, and the case is here on

assignments of error. No bill of exceptions is in the record. As the errors charged are errors of law on the face of the record (*Young v. Martin*, 8 Wall. 354) such bill is not necessary.

The First National Bank of Wilmington was totally insolvent in June, 1891. The insolvency was declared 24th November, 1891, and on the next day W. S. O'B. Robinson was appointed receiver by the comptroller of the currency. He acted as such receiver until 31st December, 1895, when he resigned, and A. G. Ricaud was appointed as his successor. In June, 1891, one H. M. Bowden, cashier of the bank, went before the board of tax listers or assessors of the city of Wilmington for the purpose of listing the taxable property of the bank. He included in this taxable property 1,096 shares of the capital stock, which was thereupon assessed, after making certain deductions as provided by law, at \$55,105, and upon this was levied a tax of $1\frac{1}{2}$ per cent., amounting to \$826.58. The bank did not own any of its capital stock; indeed, could not be the owner of its own stock. Rev. St. U. S. § 5201. But the shares so listed were the property of shareholders residents in said city of Wilmington.

The law of the state of North Carolina on this subject is as follows (Act 1891, c. 326, § 42): "That stockholders in every bank shall be assessed on the value of the shares in the city where the bank is located for the purpose of taxation for the state and shall be listed in the name of the corporation by the cashier and the tax due the state shall be paid direct to the state treasurer, and that the owners of shares in any bank shall list the value of their respective shares in the county, town, precinct, village or city where they reside for the purpose of county and school taxation."

The capital stock of the bank consisted of 2,500 shares, of the par value of \$100 each, of which residents of Wilmington owned 1,096 shares. The receiver (Robinson) refused to pay this tax. Thereupon levy was threatened upon the real estate of the bank, and on 10th June, 1896, the receiver paid the tax under protest. He then brought this suit for the recovery of the money so paid.

The law of North Carolina on this subject is as follows: "That no injunction shall be granted by any court or judge in this state to restrain the collection of any tax or any part thereof hereafter levied, nor to restrain the sale of any property for the non-payment of any such tax, * * * but in every case the person or persons claiming any tax or any part thereof, to be for any reason invalid * * * who shall pay the same to the tax collector or other proper authority in all respects as though it was legal and valid, such person may, at any time, * * * after such payment, demand the same * * * from the treasurer of the state or of the county, city or town for the benefit or under the authority or by the request of which the same was levied, and if the same shall not be refunded * * * may sue such county, city or town for the amount so demanded, * * * and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest." The laws of North Carolina provide the means of correcting mistakes made in listing property for taxation. Laws 1891, c. 326, § 25. The board of assessors meet on the second Monday in July, and rectify the tax list and valuation reported to them. This power does not preclude the relief provided in the same chapter, quoted above.

Suit having been brought, the case was submitted to the judge without a jury, and he found for the plaintiff.

H. McClammy, for plaintiff in error.

E. K. Bryan, for defendant in error.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

SIMONTON, Circuit Judge (after stating the facts). It is very clear that there was a grave mistake made in the matter of listing

these shares. The bank did not own one of them. Under the law of North Carolina, it was not the duty of the bank to list them. It was the express duty of each shareholder to list his own shares. Non constat, from anything appearing in the record, that each shareholder did not do his duty in this regard, and the presumption is that he did. The cashier had no right to list these shares in the name of the bank, and he, to say the least, was in gross error when he did so. The city clerk labored under grave mistake when he accepted it. The consequences of the mistake are that the general funds of the bank have been used towards the exoneration of a part of the shareholders, to the detriment not only of the other shareholders, but to the loss of the creditors of this insolvent corporation. The immediate result of the mistake is that the city of Wilmington is in possession of this money.

The only question in the case is, is the receiver estopped from setting up this mistake? Evidently the law in North Carolina recognizes that a mistake can be made in listing property for taxation. And the taxpayer who, or whose agent, has made the mistake is not estopped from showing it. This is shown by the provision of the law above quoted, under which mistakes can be corrected and tax lists verified. Under the law of Massachusetts the bank itself would not have been estopped. *Dunnell Mfg. Co. v. Inhabitants of Pawtucket*, 73 Mass. 277. In this case a manufacturing corporation was taxed in the town in which its real estate was situate, not only for such real estate and machinery, but also for all its stock in trade and other personal property. Under the law it was liable for the tax on the real estate and machinery, but its personal property was assessed in the tax on the shares in the company. The clerk of the corporation, not knowing this, or disregarding it, sent in a statement of its taxable property,—all of its assets,—and it was contended that the corporation was estopped from denying it. The court held otherwise, and that the corporation could recover back the excess paid. The general principle is stated in *City of Charlestown v. County Com'rs of Middlesex*, 109 Mass. 270. "One who, by mistake of his rights, returns to the assessors as liable for taxation a list of property which by law is exempt, is not thereby estopped to claim an abatement of the tax." Judge Cooley, in his work on Taxation (page 360), states this as the general doctrine, although some of the cases do not seem to go so far.

The mistake of the cashier should not estop the bank. He was the agent of the bank to list its property for taxation. He had no authority or semblance of authority to list as its property the shares of the Wilmington stockholders, nor to assume for the bank the payment of their tax out of the bank's funds. The law of the state of North Carolina providing that state taxes should be paid by the bank, but that municipal taxes should be paid by shareholders in the municipality of their residence, laid down a rule of public policy.

Even were the bank estopped by the action of the cashier, the receiver would not be estopped. The receiver is appointed for the benefit of creditors. He takes the property in trust for creditors. *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148. He must protect the

interest of the creditors. The cashier was not his agent, nor would the representations of the cashier bind him. It is to be remembered that it was not the bank that finally paid the tax, but the receiver, who, acting for the creditors, paid the tax under protest to prevent the sale of real estate in his hands. The receiver succeeds to the rights of the creditors as well as to the rights of the insolvent bank. Beach, Rec. § 450.

The counsel for the appellant urges upon this court that the appellee had his remedy under the laws of North Carolina, and a mode of correcting the mistake provided for him. But evidently the legislature did not consider the action of the commissioners final, in correcting or refusing to correct a mistake, for they give a right of action to recover back money illegally or irregularly paid, or "if the tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was, for any reason, invalid or excessive."

So, also, he presses on this court a line of cases, of which *Mariot v. Hampton*, 7 Term R. 269, is the leading case, which holds that, after the payment of money under legal process, bare protest at the time of payment will not justify a recovery of it back. It would seem, however, that it was for the purpose of mitigating this harsh rule that the statute of North Carolina was passed giving a right of action in such cases, and, at the same time, taking away the remedy of injunction to prevent the enforcement of the illegal tax. But in the present case the receiver paid the money as the only course left open to him, and entered his protest as notice that he would avail himself of the right of action to recover it back, secured to him by the state statute. No error appears in the circuit court decree. It is affirmed.

TEUTONIA INS. CO. v. EWING et al.

(Circuit Court of Appeals, Sixth Circuit. November 9, 1893.)

No. 584.

1. INSURANCE — POWERS OF AGENT TO BIND COMPANY — UNDISCLOSED LIMITATION OF AUTHORITY.

A limitation upon the authority of a general agent of an insurance company, having power to make contracts of insurance for the company, will not relieve it from liability on a policy issued by such agent, although in violation of such limitation, where the insured had neither actual nor constructive notice of the limitation.

2. PRINCIPAL AND AGENT—WHAT CONSTITUTES AGENCY.

An insurance agent, not being able to furnish insurance to an applicant, asked and obtained permission to obtain it for him from another agency; stating that, by an arrangement between them, he would in that case be entitled to a share of the commission. He so obtained the insurance, and received a part of the commission. *Held*, that he was not the agent of the insured in the transaction, and that the latter was not chargeable with notice of a fact communicated to him.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

This was a suit on an insurance policy. The bill of exceptions shows that on November 21, 1895, Gerstle Bros. executed a deed of assignment for the

benefit of creditors to the plaintiffs, Ewing and Solinsky, trustees, conveying, among other things, their stock of goods in their store in Pulaski; that certain creditors filed bills in chancery attacking the assignment, and attached the stock of goods, and plaintiffs were appointed receivers in these suits November 22, 1895; that thereafter Ewing and Solinsky, as trustees and receivers, applied to Harwood & Crockett, insurance agents at Pulaski; for additional insurance on the stock of goods to the amount of \$7,500; that Harwood & Crockett were unable to grant, and declined, further insurance in the companies represented by them, because they were carrying full lines on the property at risk; that N. A. Crockett, one of the firm, then requested plaintiffs to let him place the insurance with some other agency, stating that, under an arrangement with the insurance agents in Pulaski, his firm would get half of the commissions on business thus placed by them; that this was assented to by plaintiffs; that he applied to Oaks & Abernathy, insurance agents at Pulaski, for the granting of such additional insurance of \$7,500; that he went to their office for that purpose, and he and J. T. Oaks, one of the partners, examined the policy register of the defendant company, which Oaks & Abernathy represented, and a letter of instructions issued by it, containing prohibited risks; that among other risks prohibited was the following, "all property in liquidation"; that Crockett and Oaks agreed that the risk offered was not within the prohibition; that thereupon Oaks, as agent of the defendant company, issued to Ewing and Solinsky, as trustees and receivers, insurance on the goods for \$2,500, to date from noon on November 23, 1895, in consideration of a payment of \$37.50; that Oaks & Abernathy paid Harwood & Crockett half of their commissions, in accordance with the agreement already referred to; that there was no proof that plaintiffs ever saw the defendant's letter of instructions to its agents, or were ever informed as to its contents; that on the night of November 23, 1895, the stock of goods, then of a cash value of \$23,950.51, was partially destroyed by fire; that the plaintiffs furnished proper and sufficient proof of loss; that the daily report of the insurance by Oaks & Abernathy was not received by the defendant company until after it had received notice by wire of the loss, when it denied liability, and gave as its reasons that its agents were instructed not to insure property in liquidation; that Harwood and Crockett were cashier and assistant cashier of the People's National Bank, of which Ewing and Solinsky were directors; and that Harwood & Crockett had looked after the transfer of other insurance policies on the stock issued to Gerstle Bros., before the assignment, from the assignors to the trustees. The court left the issues to the jury, and the jury found for the plaintiffs. Exceptions were taken to several parts of the charge by the trial court, but, in the view which this court takes of the case, it is unnecessary to set out the charge or the exceptions.

Albert Marks, for plaintiff in error.

Joseph T. Allen, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts). Oaks & Abernathy were agents of the defendant insurance company to make contracts of insurance. By a letter of instructions, of which the plaintiffs had no actual knowledge, their general agency to insure property was limited. The limitation will not relieve the defendant, therefore, from liability for the act of its agents, though in violation of it, unless it can show that the plaintiffs are to be charged with constructive notice of the limitation, by reason of the other circumstances disclosed. The argument on behalf of the insurance company is that Crockett was the agent of the plaintiffs in obtaining the insurance, and that, as Crockett was advised by

Oaks of this limitation, the plaintiffs are charged with knowledge of it. Upon the facts stated, we do not think that Crockett was the agent of the plaintiffs in procuring this insurance. He stated to the plaintiffs that there was an arrangement between the agents of the different insurance companies in Pulaski, by which, if one brought business to another, they would share commissions, and that he wished the opportunity to take this business to some other agency, so that he might share the commission. This did not make Harwood & Crockett the agents of the plaintiffs. They were merely insurance solicitors. It may be—we do not decide the point—that Crockett was not the agent of the insurance company. He might have been the agent of neither party. He really was the agent of the agents of the defendant. He was their solicitor of insurance. The compensation for his services had been agreed upon in advance. The plaintiffs were advised by Crockett that this was the capacity in which he was acting, and so was Oaks. When, therefore, the insurance policy contract was brought by Crockett to the plaintiffs, he was bringing it, not as their agent, but as the agent of the representatives of the defendant company who paid him. His knowledge could not, therefore, be charged to the plaintiffs. Errors, if any, in the instructions of the court to the jury, could not have been prejudicial to the defendant below, because the plaintiffs were entitled, as a matter of law, to the verdict. Judgment affirmed.

THOMPSON v. SELIGMAN et al.

(Circuit Court, S. D. New York. November 18, 1898.)

PLEADING—DENIAL ON INFORMATION AND BELIEF—WHEN INSUFFICIENT.

An answer which sets up as a counterclaim an alleged loan of money by defendant to plaintiff, and an account stated between them therefor, alleges facts presumptively within the personal knowledge of plaintiff, and a reply containing only a general denial on information and belief, and verified on belief only, is insufficient as an answer to the counterclaim, and is demurrable.

On Demurrer to Reply.

Robert G. Ingersoll, for plaintiff.

George W. Seligman, for defendants.

WHEELER, District Judge. The answer sets up a counterclaim against the plaintiff for money loaned, with interest, amounting to \$3,056.67, November 25, 1889, whereupon an account was stated between the plaintiff on the one side and the defendant James Seligman, with a co-partner, since deceased, on the other side, "and upon such statement a balance of \$3,056.67 was found to be due on the said 25th day of November, 1889, from the said plaintiff to this defendant," etc. The reply is that the plaintiff, "upon information and belief, denies each and every allegation therein contained," verified by his oath "that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true," which is demurred to upon

the ground that it "is insufficient in law upon the face thereof"; and the cause has now been heard upon this demurrer. The reply stands as an answer to the cause of action stated in the counterclaim required to be verified, and the question here now is whether it is sufficient as such answer. The loan of money, and the statement of the account of it between the parties, implies personal transactions to the knowledge of the plaintiff. The answer does not deny the knowledge, nor set it forth, nor explain the want of it. It is well laid down in the *Encyclopædia of Pleading and Practice*, with reference to this kind of procedure, that:

"Although the denial of knowledge or information is an authorized form of denial, it is by no means absolute or universal. The true distinction to be observed in determining when a defendant may avail himself of the privilege accorded to him of answering in the qualified form allowed by the Code, and when he must positively admit or deny the allegations, is to inquire whether the facts alleged are presumptively within the defendant's knowledge. If they are, he cannot avail himself of this form of denial." 1 *Enc. of Pl. & Prac.* 811, and cases cited.

In this view this reply does not seem to be sufficient. This is said in argument to be merely such an objection to the verification of the reply as should have been made by a motion to dismiss, but the reply seems to lack the substance required in an answer to such a cause of action, and to be well met by the demurrer. Demurrer sustained.

BLUM et al. v. WIDDICOMB et al.

(Circuit Court, W. D. Michigan, S. D. November 9, 1898.)

PARTIES—SUIT TO RECOVER PENALTY—CONSTRUCTION OF STATUTE.

2 How. Ann. St. Mich. § 8429, providing that suits for penalties shall be brought in the name of the state, relates only to penalties proper, imposed as punishment for some act deemed to be an offense against the state, and does not apply to an action brought upon a provision of a statute creating a liability in favor of a private individual in excess of actual compensation, which is a remedial action, and may be brought by the individual entitled to the recovery, though the same statute imposes a penalty as a punishment for the same act in its character of an offense against the state.

This was an action brought to charge individually the directors of a corporation for a debt of the latter, grounded upon their failure to make proper annual reports to the secretary of state, as required by the statute of Michigan, which statute imposes a personal liability for such failure. On demurrer to declaration.

Cahill & Ostrander, for plaintiffs.

Kingsley & Kleinhans, for Bonnell and Hackley.

Butterfield & Keeney, for Putman and Barnhart.

Fitzgerald & Barry, for defendant Morton.

SEVERENS, District Judge. I think the demurrer to the plaintiff's declaration in this case must be overruled. The essential ground on which the demurrer rests is the proposition, contended for by counsel for the defendants, that section 12 of Act No. 232

of the Public Acts of Michigan for 1885, which was enacted to provide such a remedy as the plaintiffs are now pursuing, is penal in its character. Upon the assumption of this proposition it is further contended: First, that the action, being for a penalty, should be brought in the name of the state, in accordance with the provisions of section 8429, How. Ann. St.; secondly, it is urged that the law of 1885, in force at the date when the supposed liability was incurred, has been repealed by subsequent statutes,—Act No. 164 of the Public Acts of 1895, and Act No. 250 of the Public Acts of 1887, which are amendments of the law of 1885. Hence it is contended that, the original statute being no longer in force, the right to sue for the penalty imposed by the former law is gone, in accordance with the doctrine applicable in that respect to penal actions. In my opinion, the error is in the fundamental proposition, which ignores the distinction between the various significations in which the word “penal” is employed in legal expression. In its primary sense it has reference to punishment, and, as applied to statutes, refers to such as impose punishment for offenses against the state. In another sense, the word has been employed to characterize statutes which afford a remedy to private parties, where the remedy is given in excess of the common law and exact compensation for the injury to be redressed. Such statutes are sometimes denominated penal, and are sometimes characterized as being in the nature of penal statutes. Sometimes, as in this case, the same statute has the double aspect of not only imposing a liability in favor of a private individual which is in excess of exact compensation, but also imposes a penalty proper, which is intended as a punishment for the act in its character of an offense against the state; but each provision is distinct in its nature, as much so as if in separate statutes. Proper attention to the above-stated distinction solves the questions which are involved. The particular provision of the statute on which the action is founded does not impose a penalty for an offense against the state, but gives a remedy to private persons who are supposed to have suffered injury from the wrongful act complained of. Section 8429, How. Ann. St., above referred to, provides that suits for penalties shall be brought in the name of the state, and relates only to penalties proper,—that is to say, such as are imposed for the purpose of punishing some act deemed to be an offense against the state. Actions brought upon the remedial provisions of a statute are properly brought in the name of the person injured. The recovery in such case is not to the state, nor for its benefit; in fact, the state has no concern with it. These considerations refute also the second ground of demurrer above stated. It is a matter of some doubt whether the original law should be treated as repealed by the amendments. The reasoning of Judge Montgomery in delivering the opinion of the supreme court in *Bank v. Peirson* (Mich.) 70 N. W. 901, makes it quite uncertain, to say the least, whether that court would hold that the latest amendments would effect a repeal of the old law. But it is not necessary, in my judgment, to determine whether the later acts repeal the original act or not, for, if the remedy is a private one, under the distinction above stated, the repeal

of the law after the liability had been incurred would not discharge the defendants from their liability. Without going more into detail, the conclusion is that the demurrer should be overruled. The defendants will have leave to plead, if they shall so elect.

BOARD OF COM'RS OF SEWARD COUNTY, KAN., v. AETNA LIFE
INS. CO.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1898.)

No. 1,054.

1. MUNICIPAL BONDS—ESTOPPEL BY RECITALS—REFUNDING BONDS.

Under the constitution and statutes of Kansas, which vest the board of commissioners of a county with the power to settle and allow claims against it, a recital in bonds issued by a county that they were issued by the county board in accordance with the provisions of a statute authorizing counties to refund their indebtedness is a representation that the debt refunded was just and valid; and, as against an innocent purchaser of such bonds in reliance upon this representation, the county is estopped from denying it for the purpose of defeating their collection.

2. SAME—LEGISLATIVE POWERS.

The power to borrow money, to incur indebtedness, to make contracts, and to issue bonds, on behalf of the people of the state, or on behalf of any political subdivision thereof, are all essentially legislative powers, which it is the province of the legislature to exercise itself, or to delegate to municipal or quasi municipal corporations, to be exercised free from every restriction not expressly imposed by the constitution of the state or the inalienable rights of man.

3. SAME—CONSTITUTIONAL PROVISIONS.

The provision of the constitution of Kansas prohibiting the contracting of any debt by the state, with certain exceptions, unless authorized by a direct vote of the electors, has no application to the debts of counties or municipalities.

4. SAME—POWER TO ISSUE REFUNDING BONDS.

The constitution of Kansas imposes no limitation upon the authority of the legislature to authorize the board of commissioners of a county to refund its indebtedness by the issuance of bonds, but, on the contrary, by providing that the legislature "may confer upon tribunals transacting the business of the several counties such power of local legislation and administration as it shall deem expedient," directly empowers it to authorize such action, which is not the creation of a new debt, but only a matter of fiscal administration.

5. SAME—NATURE OF INDEBTEDNESS REFUNDED.

County warrants are prima facie proof of the validity of the debts they evidence, and afford a legal basis for refunding bonds issued under Laws Kan. 1879, c. 50, authorizing counties to refund their "matured or maturing indebtedness of every kind and description whatever."

6. SAME—CONSTRUCTION OF STATUTES—SPECIAL ACT.

Laws Kan. 1879, c. 50, gave authority to all counties and other municipal subdivisions of the state to refund their indebtedness, without limitation of amount. By an amendment of such law March 9, 1891, it was provided that except for the refunding of outstanding bonds or matured coupons, or judgments thereon, no bonds should thereafter be issued under its provisions where the total bonded indebtedness would thereby exceed 5 per cent. of the assessment of the municipality. The bonded indebtedness alone of Seward county at that time exceeded such limit. By Laws 1893, c. 114, the board of commissioners of Seward county was authorized and empowered "to refund any and all outstand-

ing indebtedness existing on May 1, 1891, and still unpaid." *Held*, that the latter act did not conflict with, nor operate to repeal, the general law, as to Seward county, but merely to except such county from the limitation imposed by the amendment of 1891, so far as it applied to the indebtedness then existing, and to confer upon that county the additional privilege of refunding such indebtedness.

7. SAME—VALIDITY OF SPECIAL ACT.

The latter act is not invalid under the provision of the Kansas constitution prohibiting the enactment of a special law where a general law could be made applicable; the determination of the necessity for special legislation being within the exclusive province of the legislature, under the decisions of the supreme court of the state.

8. CONSTRUCTION OF STATUTES—TWO ACTS ON SAME SUBJECT.

When there are two acts upon the same subject, they must stand together, if possible; if the two are repugnant in any of their provisions, the later act operates as a repeal of the earlier one, so far, and only so far, as its provisions are repugnant to those of the earlier act.

9. SAME—GENERAL AND SPECIAL LAWS.

Privileges granted by special act are not affected by inconsistent general legislation on the same subject, but the special act and general laws must stand together, the one as the law of the particular case, and the other as the general law of the land.

10. SAME.

All statutes in *pari materia* are to be read and construed together, as if they formed part of the same statute, and were enacted at the same time.

In Error to the Circuit Court of the United States for the District of Kansas.

S. S. Ashbaugh (T. A. Scates, on brief), for plaintiff in error.

O. H. Bentley and Rudolph Hatfield, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This is a writ of error challenging a judgment which sustained a general demurrer to the answer of the plaintiff in error, the board of county commissioners of Seward county, in the state of Kansas, and granted to the Ætina Life Insurance Company, the defendant in error, the recovery it sought. The action was brought to enforce payment of coupons cut from refunding bonds of Seward county, some of which were issued under chapter 50 of the Laws of Kansas of 1879 (Gen. St. Kan. 1889, par. 464), and others under chapter 114 of the Laws of Kansas of 1893. The pleadings conceded that the defendant in error purchased the bonds and coupons for value before maturity; and, while the answer contains an averment that the insurance company knew the facts on which the various defenses are founded, it is not claimed that it ever had any other notice or knowledge thereof than that with which it is charged by the law, and the existence of the record of the proceedings which resulted in the issue of the bonds. The answer pleads many defenses, but the opinions of this court and those of the supreme court of Kansas contain repeated statements of the reasons why they cannot prevail. It would be an idle task to recite them again here. Suffice it to say, in deference to the zeal and ability of counsel, we have again examined those decisions, only to be confirmed in the views there expressed; and we shall content ourselves in this case with a brief statement of

the propositions on which they rest, and a reference to the cases in which they were rendered.

1. The bonds from which these coupons were cut were issued to refund debts evidenced by county warrants, and one defense is the customary one in cases of this kind, that the—

“County warrants were utterly null and void, and had been issued contrary to law, and for purposes not authorized by law, and never have been, and were not then, a legal indebtedness against said county.”

The General Statutes of Kansas provide that:

“The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners.” “The board of county commissioners of each county shall have power at any meeting * * * second, to examine and settle and allow all accounts chargeable against the county; and when so settled they may issue orders therefor as provided by law.” Gen. St. Kan. 1889, pars. 1613, 1630.

The acts of the legislature of Kansas under which these bonds were issued authorized the county to refund its indebtedness. Each of the bonds contained a recital of the refunding act, and a certificate to the effect that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds had been properly done, had happened, and had been performed in regular and due form as required by law. Each bond recited that the board of county commissioners of Seward county had caused it to be signed by its chairman, and to be attested and registered by the county clerk, and it was so signed, attested, and registered. Under the statutes referred to, the power was vested in and the duty was imposed upon the board of county commissioners to ascertain and decide whether or not the warrants refunded evidenced a valid debt before they issued these bonds. The issue of the bonds was a representation by the county to all the world that the debt refunded was just and valid, and, when an innocent purchaser had paid for these bonds in reliance upon this representation, the county was estopped from denying it for the purpose of defeating their collection. “A municipal corporation is estopped from defending an action by an innocent purchaser to collect its negotiable bonds, which recite that they were issued for the purpose of funding the bonds, warrants, or floating debt of the corporation, either on the ground that the warrants or bonds which they were issued to satisfy were void, or that the apparent debt which they were issued to pay was fictitious.” *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272, 275, 277; *National Life Ins. Co. of Montpelier v. Board of Education of City of Huron*, 10 C. C. A. 637, 644, 62 Fed. 778, 785, and 27 U. S. App. 244, 255; *West Plains Tp. v. Sage*, 16 C. C. A. 553, 557, 69 Fed. 943, 946, and 32 U. S. App. 725, 733; *Board v. Howard*, 27 C. C. A. 531, 533, 83 Fed. 296, 298, and 49 U. S. App. 642, 645; *Jasper Co. v. Ballou*, 103 U. S. 745, 752; *Commissioners v. Beal*, 113 U. S. 227, 240, 5 Sup. Ct. 433; *Cairo v. Zane*, 149 U. S. 122, 137, 13 Sup. Ct. 803; *Ashley v. Board*, 8 C. C. A. 455, 466, 60 Fed. 55, 66, and 16 U. S. App. 656, 675; *City of Cadillac v. Woonsocket Sav. Inst.*, 7 C. C. A. 574, 578, 58 Fed. 935, 939, and 16 U. S. App. 546, 558. For all the purposes of this case, therefore,

the debts evidenced and refunded by these bonds must be deemed to have been the just obligations of the county.

2. Another defense urged is that all the bonds and coupons were void because they were issued without a vote of the electors of the county. The syllogism is: The debts refunded were fictitious, and did not bind the county. The legislature had no power, under the constitution, to create a debt of the county without a vote of its electors. Therefore the refunding bonds by which the legislature attempted to create such a debt were issued without authority, and are void. The argument fails because the major premise is untrue. The county is estopped from contending that the debts refunded were invalid, and for all the purposes of this action they were legal and binding obligations of the corporation. Moreover, the legislature did not issue, and did not attempt to issue, these refunding bonds. It merely permitted the county itself to do so, through the agency of that board, by whose action alone it can exercise any of the powers of a body politic or corporate under the system of government adopted by the state of Kansas. Const. Kan. art. 2, § 21; Gen. St. Kan. 1889, par. 1613. It is to this board that the legislature of Kansas has committed the duty of making contracts, of levying taxes, and of auditing and allowing the obligations of the county. Why can it not also intrust it with the authority to change the debts it allows, from warrants to bonds? The answer of counsel for the county is that it cannot do so because the constitution of Kansas contains these provisions:

"All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature which may not be altered, revoked, or repealed by the same body, and this power shall be exercised by no other tribunal or agency." "This enumeration of rights shall not be construed to impair or deny others retained by the people." Bill of Rights, §§ 2, 20. "No debt shall be contracted by the state except as herein provided, unless the proposed law for creating such debt shall first be submitted to a direct vote of the electors of the state at some general election; and if such proposed law shall be ratified by a majority of all the votes cast at such general election, then it shall be the duty of the legislature next after such election to enact such law and create such debt, subject to all the provisions and restrictions provided in the preceding section of this article." Article 11, § 6. "The legislature may confer upon tribunals transacting the county business of the several counties, such power of local legislation and administration as it shall deem expedient." Article 2, § 21.

There is, however, no restriction here upon the power of the legislature to authorize a board of county commissioners, or any other agents it may select, to refund the debts of a county. The limitation found in section 6 of article 11 is expressly confined to debts of the state, and has no possible reference to those of municipal or quasi municipal corporations. On the other hand, the express grant of authority to the legislature to confer upon the county boards such powers of local legislation and administration as it shall deem expedient, by section 21 of article 2, is clear and full, and the exchange of county warrants or any other evidences of debt for county bonds is nothing but an act of fiscal administration. Even if it were more,

the power to levy taxes upon any of the property of the state, to build school houses, roads, court houses, and to make other public improvements at the expense of the people; the power to borrow money, to incur indebtedness, to make contracts, to issue bonds on behalf of the people of the state, or on behalf of any political subdivision thereof,—all these are essentially legislative powers, which it is the province of the representatives of the people assembled in the legislature to exercise themselves, or to delegate to municipal or quasi municipal corporations, to be exercised free from every restriction not expressly imposed by the constitution of the state, or the inalienable rights of man. The constitution of Kansas imposed no limitation upon the authority of the legislature of that state to refund the debts of the county of Seward, or upon its power to authorize the board of county commissioners of that county to do so, and the acts of that board in refunding the debts of that county without a vote of its electors were neither unconstitutional nor invalid. *Travelers' Ins. Co. v. Oswego Tp.*, 7 C. C. A. 669, 678, 59 Fed. 58, 66, 67, and 19 U. S. App. 321, 335, and cases there cited; *Board v. Howard*, 27 C. C. A. 531, 534, 83 Fed. 296, 299, and 49 U. S. App. 642, 646; *Riley v. Garfield Tp.* (Kan. Sup.) 49 Pac. 85; *Id.*, 54 Kan. 463, 38 Pac. 560.

3. It is contended that the bonds issued under chapter 50 of the Laws of 1879 are void because the act did not authorize the refunding of county warrants. County warrants are prima facie proof of the validity of the debts they evidence. *Speer v. Board*, 32 C. C. A. 101, 88 Fed. 749, 756; *Wall v. Monroe Co.*, 103 U. S. 74, 77; *Thompson v. Searcy Co.*, 6 C. C. A. 674, 679, 57 Fed. 1030, 1036, and 12 U. S. App. 618, 627; *Board v. Sherwood*, 11 C. C. A. 507, 511, 64 Fed. 103, 107, and 27 U. S. App. 458, 464; *Commissioners v. Keller*, 6 Kan. 511, 523. And the plaintiff in error is estopped by the issue of the bonds and the recitals they contain from questioning the legality of the debts refunded by them. Chapter 50 of the Laws of 1879 provides:

"That every county * * * is hereby authorized and empowered to compromise and refund its matured and maturing indebtedness of every kind and description whatsoever, upon such terms as can be agreed upon, and to issue new bonds with semi-annual interest coupons attached in payment of any sums so compromised."

The debts refunded were either matured or maturing debts of some kind or description, and were therefore expressly included in the terms of the act, whether they were evidenced by bonds, judgments, warrants, or simple contracts. *Board v. Howard*, 27 C. C. A. 531, 534, 83 Fed. 296, 299, and 49 U. S. App. 642, 646; *Riley v. Garfield Tp.* (Kan. Sup.) 49 Pac. 85; *Id.*, 54 Kan. 463, 38 Pac. 560.

4. It is claimed that the bonds issued under chapter 114 of the Laws of 1893 are void because the bonded indebtedness of Seward county was in excess of the limitation prescribed by section 2 of chapter 163 of the Laws of 1891 when they were issued. This was the state of the case when the act of 1893 was passed, and when these bonds were issued under it: In 1879 the legislature of Kansas had enacted a general law, applicable to every county, every city, every township, and every school district in the state, which au-

thorized them to refund their debts, and to issue bonds therefor, without any limitation of the amount. Chapter 50 of the Laws of 1879 (Gen. St. Kan. 1889, par. 464). In 1891 the legislature amended that law by adding this proviso:

"And provided further, that except for the refunding of outstanding bonds or matured coupons thereof, or judgments thereon, no bonds of any class or description shall hereafter be issued where the total bonded indebtedness of such county or township would thereby exceed five per cent. of the assessment for taxation as shown by the last finding and determination by the proper board of equalization." Laws 1891, c. 163, § 2.

The bonded indebtedness of Seward county exceeded 5 per cent. of its assessed valuation, so that under this amendment it could not refund any part of its debt that was not already evidenced by bonds or coupons. Thereupon the legislature passed chapter 114 of the Laws of 1893, which is a special law, entitled "An act authorizing Seward county, Kansas, to refund its outstanding indebtedness existing on May 1st, 1891, and still unpaid," and which provides that:

"The board of county commissioners of Seward county, Kansas, is hereby authorized and empowered to refund any and all outstanding indebtedness existing on May 1st, 1891, and still unpaid by issuing bonds to the holders of such outstanding indebtedness."

This act contains six sections, and prescribes the method in which the bonds shall be issued and paid, and is in itself complete, independent, and effective. The purpose and effect of this enactment are plain, and the terms used to accomplish them are free from all ambiguity. They were to enable Seward county "to refund any and all outstanding indebtedness existing on May 1st, 1891," notwithstanding the limitation of the general law. What the legislature of 1891 could prohibit, the legislature of 1893 could permit, either in whole or in part. The effect of chapter 114 of the Laws of 1893 was to except Seward county from the terms of the limitation of the act of 1891. It did not repeal the general law, nor deprive the county of Seward of any of the powers and privileges granted to it in common with every other county in the state by that law; but it had the effect to confer upon Seward county the additional privilege of refunding all the debts it owed on May 1, 1891, although its bonded indebtedness already exceeded the limitation prescribed by the act of 1891. This conclusion is in accord with the settled rules of construction, that, when there are two acts upon the same subject, they must stand together, if possible; that, if the two are repugnant in any of their provisions, the later act operates as a repeal of the former act, so far, and only so far, as its provisions are repugnant to those of the earlier act (*In re Henderson's Tobacco*, 11 Wall. 652, 657); that privileges granted by special act are not affected by inconsistent general legislation on the same subject, but the special act and the general laws must stand together, the one as the law of the particular case, and the other as the general law of the land (*Gowen v. Harley*, 6 C. C. A. 190, 196, 56 Fed. 973, 979, and 12 U. S. App. 574, 584); and that "all statutes in *pari materia* are to be read and construed together, as if they formed part of the same statute, and were enacted at the same time." *Potter*, Dwar. St. 145. The bonded indebted-

ness of Seward county was not limited by section 2 of chapter 163 of the Laws of 1891 after the passage of chapter 114 of the Laws of 1893.

5. Finally it is said that the bonds issued under chapter 114 of the Laws of 1893 are void because that act violated section 17 of article 2 of the constitution of Kansas, which provides that:

"All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted."

The argument here is that the enactment of chapter 50 of the Laws of 1879 demonstrates the fact that the legislature found that a general law could be made applicable to this subject, and therefore no special law could be legally passed. But the decision of that question by the legislature of 1879, upon the state of facts then existing, could not deprive the legislature of 1893 of the power to consider and determine whether or not such a law could be justly made to apply to all the counties of the state as they were situated in that year. Chapter 114 of the Laws of 1893 is conclusive evidence that the legislature of that year decided that a general law could not then be fairly made to apply to all the counties of the state, for the obvious reason that the law proper for the other counties prohibited Seward county from refunding any of its debts that were not evidenced by bonds or coupons. Under the decisions of the supreme court of Kansas, it is not, however, material what reason, or whether or not any reason, induced the legislature to enact the special law of 1893. Under the construction which that court has uniformly given to the constitution of Kansas, the determination of the question whether or not a general law may be made applicable to any subject is a purely legislative function, and the enactment of a special law, even when a general law on the same subject is already in force, settles the question, and makes the special act impregnable to attack under this clause of the constitution of that state. *Beach v. Leahy*, 11 Kan. 28; *Commissioners v. Shoemaker*, 27 Kan. 77; *Washburn v. Commissioners*, 37 Kan. 217, 221, 15 Pac. 237; *State v. Sanders*, 42 Kan. 228, 233, 21 Pac. 1073; *Elevator Co. v. Stewart*, 50 Kan. 378, 383, 32 Pac. 33; *Eichholtz v. Martin*, 53 Kan. 486, 488, 36 Pac. 1064; *Travelers' Ins. Co. v. Oswego Tp.*, 7 C. C. A. 669, 673, 59 Fed. 58, 61, and 19 U. S. App. 321, 327; *Rathbone v. Board*, 27 C. C. A. 477, 481, 83 Fed. 125, 129, and 49 U. S. App. 577, 587.

The judgment below is affirmed.

BOARD OF COM'RS OF HASKELL COUNTY, KAN., v. NATIONAL LIFE
INS. CO. OF MONTPELIER, VT.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1898.)

No. 1,055.

1. MUNICIPAL BONDS—ESTOPPEL BY RECITALS—REFUNDING BONDS.

A recital in county bonds that they were issued in accordance with the provisions of a statute authorizing counties to refund their indebtedness imports that they were issued in pursuance of a lawful and proper reso-

lution, and of honest and just action on the part of the county board, under that statute, and also that the obligations refunded were such as could lawfully be refunded thereunder. It relieves the innocent purchaser of all inquiry, notice, or knowledge of the actual action and record of the board, and estops the county from denying that proper action was taken and that a lawful resolution was passed.

2. SAME—RECITALS IN RECORD.

A municipal corporation cannot make a false certificate on the face of its negotiable bonds, or a false record that they are issued in accordance with the law for a lawful purpose, and then defeat a recovery upon them by an innocent purchaser, who has bought in reliance upon the certificate or record, by proof that they were in fact issued for an unlawful purpose.

3. SAME—CONSTRUCTION OF STATUTE—REFUNDING BONDS.

Laws Kan. 1879, c. 50, as construed by the supreme court of that state, which construction is binding on the federal courts, authorizes the commissioners of a county to refund with negotiable bonds all indebtedness of the county that was due at the time of its passage, or that might at any time become due.

4. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS—REFUNDING MUNICIPAL BONDS.

Bonds issued by the board of commissioners of a county of Kansas, which, under the constitution and laws of that state, is the only body which can exercise the powers of, or make a contract for, the county as a body politic or corporate, although they may be issued upon a petition of the taxpayers, or on a vote of the electors of the county, are contracts of the county only, and not of the petitioners, taxpayers, or voters, who are not bound by the obligation thereof; hence a change in the terms of such contracts by the issuance of refunding bonds, under proper legislative authority, does not impair the obligation of any contract made by the taxpayers or electors.

In Error to the Circuit Court of the United States for the District of Kansas.

S. S. Ashbaugh, for plaintiff in error.

O. H. Bentley and Rudolph Hatfield, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This is an action upon coupons cut from refunding bonds issued by the county of Haskell, in the state of Kansas, under chapter 50 of the Laws of that state of 1879 (Gen. St. Kan. 1889, par. 464). The court below sustained a demurrer to the answer of the plaintiff in error, and rendered a judgment against the county. The answer contains the same defenses interposed to the bonds issued under chapter 50 of the Laws of 1879, in the case of Board of Com'rs of Seward Co. v. *Ætna Life Ins. Co.*, 90 Fed. 222. An attempt is made to distinguish from the defenses in that case one which is interposed in this case to the coupons cut from 10 of the bonds here in question. This defense is that these 10 bonds, which will fall due in 1918, and which were issued to refund bonds due in 1909, which had been executed, but never delivered by the board of county commissioners of Haskell county, pursuant to a vote of the electors of the county under an unconstitutional law, were void, because the original bonds were so, and because the issue of the refunding bonds, with different terms and times of payment from those

contained in the original bonds, impaired the obligations of the contracts which the electors had assumed by their vote in favor of the latter. Among the many interesting acts passed by the legislature of Kansas to authorize the issue of bonds was one entitled "An act authorizing a bounty for breaking sod in Haskell county, Kansas, and to issue the bonds of said county to provide funds therefor." This act provided that, upon a favorable vote of the electors of that county, the board of county commissioners might issue 10 bonds of the county, of the denomination of \$1,000 each, due January 1, 1909, and might use the proceeds thereof to pay the residents and freeholders of the county a bounty of one dollar per acre for breaking sod. Laws Kan. 1889, c. 154. The people voted, as usual, to issue the bonds; and in April, 1889, the board executed them, and placed them in the hands of its agent to sell, but he never found a purchaser. At a regular meeting of the board held on June 4, 1889, it made a record of an offer from W. W. Hetherington, of Atchison, Kan., to refund the bonds of the county, numbered from 1 to 10, inclusive, for the sum of \$1,000 each, dated April 13, 1889, and payable January 1, 1909, upon the delivery to him of the refunding bonds of the county of like denominations, and of a resolution of the board "that the present ten thousand dollars outstanding bonds of Haskell county, issued April 13, 1889, under the provisions of the Laws of Kansas, interest payable semiannually, and due January 1, 1909, the same now being the valid bonded obligation of this county, be refunded by the issuance of ten bonds of \$1,000 each, numbered from 1 to 10 inclusive; to be dated June 4, 1889, and mature fully July 1, 1918, with coupons attached for semiannual payments of interest at 6 per cent. per annum." It is conceded that the invalidity of the original bonds would be no defense to the refunding bonds were it not for this record of June 4, 1889; but it is contended that this was sufficient to put every purchaser upon inquiry, and to charge him with notice that the original bonds represented no debt.

There are at least two reasons why this position is untenable. In the first place, each of the refunding bonds contains this recital:

"This bond is issued in accordance with the provisions of an act of the legislature of the state of Kansas approved March 8, A. D. 1879, entitled 'An act to enable counties, municipal corporations, the board of education of any city, and school districts to refund their indebtedness.' We hereby certify that all and singular the provisions of the above law have been fully complied with in issuing this bond, and all preliminary steps therein required have been taken, and all conditions precedent and subsequent there provided for have been fully met and complied with."

It is true that in *National Bank of Commerce v. Town of Granada*, 54 Fed. 100, 4 C. C. A. 212, and 10 U. S. App. 692, and in *Hinkley v. City of Arkansas City*, 69 Fed. 768, 773, 16 C. C. A. 395, 400, and 32 U. S. App. 640, 650, this court expressed the view that such a recital would not estop a municipality from showing that no proper ordinance had been passed or proceedings taken by the legislative body of the municipality authorizing the issue of the bonds; but, since those decisions were rendered, the exact question whether or not the recital in a series of bonds that they were issued "in pursuance of an act of the legislature of the state of Indiana and ordinances of the city council of

said city, passed in pursuance thereof," put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued, was certified to the supreme court by the circuit court of appeals of the Seventh circuit, and that court answered that it did not. In concluding the discussion of that question, the supreme court said:

"As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the nonperformance of the conditions precedent were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them, they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature." *Evansville v. Dennett*, 161 U. S. 434, 439, 443, 16 Sup. Ct. 613.

The decision of that court is the law of this land, and the duty of this court will be performed when it enforces and applies it. The result is that the recital in the bonds before us that they were issued in accordance with the provisions of the statute imports that they were issued in pursuance of a lawful and proper resolution, and of honest and just action on the part of the board of county commissioners under that statute. It relieves the innocent purchaser of all inquiry, notice, and knowledge of the actual action and record of the board, and estops the county from denying that proper action was taken, and that a lawful resolution was passed. *Wesson v. Saline Co.*, 73 Fed. 917, 919, 20 C. C. A. 227, 229, and 34 U. S. App. 680, 684; *Rathbone v. Board*, 83 Fed. 125, 131, 27 C. C. A. 477, 483, and 49 U. S. App. 577, 589; *City of South St. Paul v. Lamprecht Bros. Co.*, 31 C. C. A. 585, 88 Fed. 449.

In the second place, if the purchaser had examined the record of the proceedings of the board on June 4, 1889, upon which the issue of these bonds was based, he would have found nothing there to inform him that the original bonds were issued under an unconstitutional law, or that they were invalid. That record nowhere refers to the act under which those bonds were issued, nowhere gives notice that they were *sod* bonds, nowhere challenges their validity, but on the contrary, in the refunding resolution of the board, describes them by number, amount, and date, and then reads, "the same being the valid bonded obligation of this county." The case presents the old question we have answered in the negative so many times: May a municipal corporation make a false certificate on the face of its negotiable bonds, or a false record that they were issued in accordance with the law for a lawful purpose, and then defeat a recovery upon them by an innocent purchaser, who has bought in reliance upon the certificate or record, by proof that they were in fact issued for an unlawful purpose? *West Plains Tp. v. Sage*, 69 Fed. 943, 947, 16 C. C. A. 553, 557, and 32 U. S. App. 725, 734; *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272, 277.

But it is said that these bonds are void: (1) Because the board of county commissioners had authority, under the act of 1879, to refund matured and maturing indebtedness only, and in 1889 the bonds refunded, which did not fall due until 1909, were neither; and (2) because the issue by the board without a vote of the electors of these

refunding bonds, which did not fall due until 1918, in exchange for those due in 1909, impaired the obligations of the contracts by which the electors of the county were bound by their vote in favor of the issue of the latter. The certificate on the face of the bonds is equally fatal to this contention. The certificate that the bonds were issued in accordance with the provisions of the act of 1879 imports, not only that the debt refunded was a valid and just obligation of the county, but also that it was such an obligation as could be lawfully refunded under that act. Moreover, the first ground on which this objection rests is untenable, because, according to the construction given to chapter 50 of the Laws of 1879 by the supreme court of Kansas, which must prevail here (*Madden v. County of Lancaster*, 65 Fed. 188, 192, 12 C. C. A. 566, 570, and 27 U. S. App. 528, 535), that chapter authorized the board of county commissioners to refund with negotiable bonds all indebtedness of the county that was due at the time of its passage, or that might at any time become due. *Carpenter v. Hindman*, 32 Kan. 601, 606, 5 Pac. 165.

The theory that the issue by the board of county commissioners without a vote of the electors of bonds in exchange for those payable at a different time and on different terms, which were authorized by a vote of those electors, is an impairment of the obligations of the contracts of the taxpayers, is unsound. A county bond issued by the board of county commissioners of a county, by the only body that, under the constitution and laws of the state of Kansas, can make a contract for, or exercise the powers of, the county as a body politic or corporate (Const. Kan. art. 2, § 21; Gen. St. 1889, par. 1613), although it may be issued on the petition of the taxpayers or on a vote of the electors of the county, is the contract of the county only, and is not the contract of the petitioners, of the voters, or of the taxpayers. A change in the terms of such a contract, an abrogation thereof, the making of a new contract, may modify, impair, or create an obligation of the county; but it cannot be said to impair an obligation of any contract of the petitioners, electors, or taxpayers, because they are not bound by the obligations of such contracts. Their property is liable to taxation to pay the obligations of the county, but there their liability ends. No action can be maintained against them upon the bonds of the county, and they are at liberty to sell their property at any time, and to remove beyond its limits free from all liability for its contracts, because they are in no way bound by the obligations thereof. The county alone stands charged with the obligations of its contracts, whether they are made with or without a petition of its taxpayers or a vote of its electors; and hence its board of county commissioners, with the consent of the other parties to the contracts, and with the proper legislative authority, may lawfully abrogate, modify, or exchange them. The defenses pleaded in this action cannot be successfully distinguished from those considered in *Board of Com'rs of Seward Co. v. Aetna Life Ins. Co.*; and, upon the authority of the opinion in that case and of the cases cited therein, the judgment below is affirmed.

BOARD OF COM'RS OF PRATT COUNTY, KAN.. V. SOCIETY FOR SAVINGS.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1898.)

No. 1,057.

1. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS—REFUNDING MUNICIPAL BONDS.

Bonds issued by the board of commissioners of a county of Kansas, which, under the constitution and laws of that state, is the only body which can exercise the powers of, or make a contract for, the county as a body politic or corporate, although they may be issued upon a petition of the taxpayers or on a vote of the electors of the county, are contracts of the county only, and not of the petitioners, taxpayers, or voters, who are not bound by the obligation thereof; hence a change in the terms of such contracts by the issuance of refunding bonds, under proper legislative authority, does not impair the obligation of any contract made by the electors or taxpayers.

2. MUNICIPAL BONDS—REFUNDING DEBT OF COUNTY—NECESSITY OF VOTE.

The refunding of a debt of a county, evidenced by a judgment against it, by the issuance of bonds in payment thereof, as authorized by Laws Kan. 1879, c. 50, is not the borrowing of money, within the meaning of Gen. St. Kan. 1889, pars. 1630, 1632, prohibiting the borrowing of money by a county without first submitting the question of such loan to a vote of the electors; hence a vote is not necessary to authorize such refunding.

3. SAME—STATUTES—REPEAL BY IMPLICATION.

A general law authorizing all counties and other municipalities in a state to refund their indebtedness, of every kind and description, by exchanging therefor bonds bearing not more than 6 per cent. interest, is not repealed by implication, as affecting a certain county, by a special act applying to such county only, which it authorized to issue a specified amount in bonds, bearing 8 per cent. interest, and to sell the same, and apply the proceeds to the payment of its outstanding warrants and the current expenses of a particular year, and which contained a proviso that the provisions of the general law should not apply to such bonds. The two statutes are not repugnant as applied to such county, and it may legally act under both.

In Error to the Circuit Court of the United States for the District of Kansas.

S. S. Ashbaugh (B. D. Crawford, on the brief), for plaintiff in error.

J. T. Herrick, W. H. Rossington, C. B. Smith, and E. J. Dallas, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This was an action upon coupons cut from refunding bonds issued by the county of Pratt, in the state of Kansas, under chapter 50 of the Laws of that state of 1879 (Gen. St. Kan. 1889, par. 464). The answer pleaded many defenses. The case was tried upon an agreed statement of facts, which conceded that the Society for Savings, the defendant in error, was an innocent purchaser for value of the bonds and coupons in question. The court below rendered a judgment against the county. All but three of the objections made to its decision have been considered and overruled in the case of Seward Co. Com'rs v. Aetna Life Ins. Co., 90 Fed. 222, and this opinion will be confined to a consideration of these three.

1. It is claimed that many of the original bonds which were exchanged for those from which some of these coupons were taken were railroad aid bonds, whose terms were fixed by a petition of the taxpayers or by a vote of the electors of the county, and that an exchange of these bonds for those bearing different terms and times of payment, without a vote of the electors, is an impairment of the obligations of the contracts of the taxpayers and electors of the county, and a violation of the provision of the constitution in that regard. There are two reasons why this position is untenable. The first is that the record nowhere discloses, either by plea or by stipulation in the agreed statement of facts, that the terms of any of the bonds refunded were fixed by, or upon a petition of, the taxpayers, or a vote of the electors of the county. The second is that a county bond issued by the board of county commissioners of a county, the only body that under the constitution and laws of the state of Kansas can make a contract for, or exercise the powers of, the county, as a body politic or corporate (Const. Kan. art. 2, § 21; Gen. St. Kan. 1889, par. 1613), although it may be issued upon a petition of the taxpayers or on a vote of the electors of the county, is the contract of the county only, and is not the contract of the petitioners, or of the voters, or of the taxpayers, and they are not bound by the obligation thereof (Haskell Co. Com'rs v. National Life Ins. Co., 90 Fed. 228).

2. The bonds from which some of the coupons in suit were cut were issued to refund debts of the county which were evidenced by judgments, and these bonds were issued without a vote of the electors of the county. It is contended that chapter 50 of the Laws of 1879 did not authorize the issue of bonds to refund judgments without a vote of the electors, and that these coupons, and the bonds from which they were taken, are consequently void. Counsel for the county do not rest this proposition upon the provisions of the act of March 8, 1879, under which the bonds were issued, which by its terms empowers the county to refund "its matured and maturing indebtedness of every kind and description" without a vote of its electors, but upon the following provisions of the General Statutes of Kansas, which they insist should be read into the act of 1879, under the rule that all acts upon the same subject are to be construed together, as if they formed parts of the same law:

"Par. 1613. The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners."

"Par. 1630. The board of county commissioners of each county shall have power, at any meeting: * * * Fourth, apportion and order the levying of taxes as provided by law, and to borrow, upon the credit of the county, a sum sufficient for the erection of county buildings, or to meet the current expenses of the county, in case of a deficit in the county revenue."

"Par. 1632. The board of county commissioners shall not borrow money for the purposes specified in the fourth subdivision of the preceding section, without first having submitted the question of such loan to a vote of the electors of the county." Gen. St. Kan. 1889.

The theory of counsel for the county is that a judgment is "current expense" of the year in which it is recovered; that by paragraphs 1630 and 1632 the board of county commissioners was forbidden to borrow money to meet current expenses without first submitting the

question of such loan to a vote of the electors; and that, therefore, it is prohibited from refunding a debt evidenced by a judgment, under the act of 1879, without such a vote. The argument is too subtle and ingenious to be sound. The conclusion drawn is not the logical inference from the premises. The refunding of a debt in the legal method prescribed in *Doon Tp. v. Cummins*, 142 U. S. 366, 378, 12 Sup. Ct. 220, is not borrowing money, nor is the exchange of bonds for a judgment the making of a loan. The conclusive legal presumption is that the refunding in this case was effected in this legal manner by the exchange of the bonds for the judgment, dollar for dollar, since the bonds contain a recital that they were issued "in compliance with" the act of 1879. *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272, 278. Such an exchange neither creates nor increases the debt; it simply changes the form of it. The creditor loans no money and the debtor obtains none, and paragraphs 1630 and 1632, which treat of borrowing money and making loans, do not relate to the same subject as chapter 50 of the Laws of 1879, and neither limit the powers conferred by that act nor prescribe the manner of their exercise. Chapter 50 of the Laws of 1879 gave the board of county commissioners ample authority to refund debts evidenced by judgments without a vote of the electors of the county.

3. Some of the coupons were cut from bonds which were issued to refund county warrants subsequent to the year 1881, and it is argued that these coupons, and the bonds from which they are cut, are void, because chapter 50 of the Laws of 1879 was repealed in so far as it empowers the county of Pratt to issue such bonds by chapter 78 of the Laws of Kansas of 1881. The act of 1879 is a general law, which authorizes every county in the state to refund its matured and maturing indebtedness of every kind and description. Chapter 78 of the Laws of 1881 is a special act, which empowers the county of Pratt to issue its bonds and to sell them for cash, or to exchange them for county orders, and to apply the bonds and their proceeds exclusively to the payment of county orders and of the current expenses of the county for the year 1881. The general law limited the rate of interest which the bonds issued under it should bear to 6 per cent. per annum. The special act fixed the rate which the bonds it authorized should draw at 8 per cent. per annum. The general law authorized the issue of bonds only after a compromise of the debt had been made. The special act authorized the county to issue bonds in exchange, dollar for dollar, for all county warrants and interest, dated prior to February 1, 1881, which should be presented to the board of county commissioners prior to April 2, 1881. The general law prohibited the issue of any bonds under it for less than par. The special law permitted the sale of those issued under it at 85 cents on the dollar. The amount of bonds issuable under the general law was limited only by the amount of the outstanding debt of the municipality. The amount of the bonds issuable under the special law was limited to \$50,000. The act of 1881 contained no clause repealing the act of 1879, but it did contain a provision that the restrictions and limitations contained in that act should not be construed as applying to, or in any manner affecting, the bonds author-

ized to be issued under the act of 1881. If the act of 1879 was repealed, if the legislature of 1881 took away from the county of Pratt any part of the power to refund its indebtedness of every kind and description, which it had granted to that county and to every other county in the state by the act of 1879, it did so by implication only, and repeals by implication are never favored. In support of the theory of a repeal by implication, counsel for the county invoke the rules (1) that where two acts upon the same subject are repugnant in any of their provisions the latter act repeals the former to the extent of the repugnancy; and (2) that, where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. But the laws we are considering do not fall under these rules. A small fraction of the subject of the act of 1879, the refunding of the county warrants of Pratt county, is the same as a part of the subject of the act of 1881. But the latter act does not undertake to treat of the refunding of any indebtedness of that county not represented by county warrants or of any indebtedness of any other county in the state, while the act of 1879 authorizes the refunding of all the indebtedness of every county, of every city of the first, second, and third class, of the board of education of every city, of every township, and of every school district in the state. There is certainly no room for argument here that the act of 1881 was intended as a substitute for that of 1879, and no repeal can be implied upon that ground. Is there any irreconcilable repugnancy in the provisions of the two laws? When there are two acts upon the same subject the rule is to give effect to both, if possible. The question is whether any part of the earlier act is repealed by necessary implication. Mr. Justice Story, in delivering the opinion of the supreme court in *Wood v. U. S.*, 16 Pet. 217, 231, speaking of this method of repeal, said: "We say, by necessary implication; for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative, or cumulative or auxiliary." Mr. Justice Strong in *Re Henderson's Tobacco*, 11 Wall. 652, 657, speaking of repeal by repugnancy, said: "But it must be observed that the doctrine asserts no more than that the former statute is impliedly repealed, so far as the provisions of the subsequent statutes are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it. Where the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed." The summary of the terms of the two acts which we have recited shows more clearly than any argument can demonstrate it that there is neither repugnancy nor inconsistency in their provisions. There is no reason why they cannot both stand together; no reason why the county of Pratt should not be allowed to exchange 6 per cent. bonds for its county warrants under the act of 1879 with all its creditors who would accept them, and to sell 8 per cent. bonds at 85 cents on the dollar under the act of 1881 to raise the money to pay the warrants held by those who would not accept the terms offered

under the earlier act of 1879. It seems clear that it was the intention of the legislature that this county should have this privilege from the general terms of the acts. But this is placed beyond doubt or cavil by the fact that the act of 1881 provides in express terms, at its close, not that the act of 1879 shall be repealed, not that any of the restrictions or limitations it imposed upon the issue of bonds under that act should be modified or removed, but that those restrictions and limitations should not be construed to apply to the bonds issued under the act of 1881. This was a useless provision, if any part of the former act was repealed by the latter. It conclusively shows that the attention of the legislature was expressly called to the effect of the two acts upon each other, and that after this was done it declined to repeal or modify the earlier act, but left it in full force, and simply provided that it should not limit or restrict the power granted by the later act. The conclusion is inevitable that the legislature intended that the two acts should stand together, each complete, independent, and effective in itself, and that the county of Pratt should have the power to issue its 6 per cent. bonds to refund its warrants under the general law, and to issue its 8 per cent. bonds and exchange or sell them under the special law for the same purpose. No part of chapter 50 of the Laws of 1879 was repealed or modified by chapter 78 of the Laws of 1881. *Pursell v. Insurance Co.*, 42 N. Y. Super. Ct. 383, 394; *State v. Morrow*, 26 Mo. 131, 141.

There is nothing in the defenses in this case to warrant a different result from that reached in *Seward Co. Com'rs v. Ætna Life Ins. Co.*, *supra*, and upon the authority of the opinion in that case, and of the cases cited therein, the judgment below is affirmed.

BOARD OF COM'RS OF MEADE COUNTY, KAN., v. ÆTNA LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. October 24, 1898.)

No. 1,056.

MUNICIPAL BONDS—ESTOPPEL BY RECITALS—REFUNDING BONDS.

A county which issued bonds containing a recital that they were issued in accordance with the provisions of a statute authorizing counties to refund their indebtedness cannot defeat recovery thereon, by a purchaser in open market in reliance on such recitals, by proof that there was included therein a sum in excess of the actual prior indebtedness of the county, which was prohibited by the statute.

In Error to the Circuit Court of the United States for the District of Kansas.

S. S. Ashbaugh (F. M. Davis, on the brief), for plaintiff in error.

O. H. Bentley and Rudolph Hatfield, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Circuit Judge. This is an action upon coupons cut from refunding bonds of Meade county, in the state of Kansas, which were issued under chapter 50 of the Laws of that state of 1879 (Gen.

St. Kan. 1889, par. 464). The court below rendered a judgment against the county upon a demurrer to its answer. This answer pleads the same defenses that were made to the bonds issued under the act of 1879 in the case of Board County Com'rs of Seward Co. v. *Ætna Life Ins. Co.*, 90 Fed. 222. The only unique feature in this case is that the plaintiff in error avers in its answer that refunding bonds to the amount of \$23,000 were issued in exchange for void and illegal county warrants, which amount, with interest, to \$22,200, and in payment of \$800 for the services of the holder of the warrants in refunding them, and it claims that all these bonds are void because they were issued in violation of section 1 of chapter 50, that the refunding bonds "shall not exceed in amount the actual amount of outstanding indebtedness." This defense, however, is not available to the county, because the bonds contain a certificate that they were issued in accordance with the provisions of the act of 1879, and they have been purchased by the defendant in error in open market in reliance upon this certificate. It is too late for the county to defeat their collection by proof that its certificate is false, and that the bonds were issued in violation of, instead of in accordance with, this statute. The judgment below is affirmed upon the authority of the opinion in Board County Com'rs of Seward Co. v. *Ætna Life Ins. Co.*, *supra*, and the cases there cited.

SCAIFE v. WESTERN NORTH CAROLINA LAND CO. et al.

(Circuit Court of Appeals, Fourth Circuit. November 15, 1898.)

No. 266.

1. EVIDENCE—BOUNDARY—STATEMENT OF PERSON SINCE DECEASED.

A declaration of a person since deceased as to a boundary is not admissible, unless it is shown that he was disinterested at the time of making it.

2. SAME—ADMISSIONS—RECORD ON FORMER TRIAL.

A distinct and formal admission of a fact, signed by an attorney of record on a trial, is competent evidence on a subsequent trial of the same case.

3. ADVERSE POSSESSION—POSSESSION OF PART OF LARGER TRACT—LAW OF NORTH CAROLINA.

Under the settled law of North Carolina, the continuous, open, notorious, and unequivocal adverse possession of a small part of a tract of land will mature title to the whole tract within the boundaries of the adverse holder's claim.

4. BOUNDARY—PLAT AS EVIDENCE.

While a plat attached to a grant may be referred to for the purpose of correcting a mistake or resolving an ambiguity in the grant, the grant must control, if it is certain.

5. APPEAL—REVIEW OF INSTRUCTIONS.

The correctness of a special instruction cannot be considered by an appellate court, where the court gave it as qualified or explained by the general charge, and such charge is not in the record.

6. ADVERSE POSSESSION—POSSESSION OF TENANT.

Under the law of North Carolina, a tenant who holds continuous, open, notorious, and unequivocal adverse possession of a definite boundary, however small, within a large tract of land, holds possession for his lessor; and his possession inures to the benefit of the lessor, as to the whole of the land covered by the deed under which he claims title.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

J. H. Merrimon and M. Silver, for plaintiff in error.

T. H. Cobb and F. A. Sondley, for defendants in error.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

BRAWLEY, District Judge. This was an action to try title to and recover land, in which the plaintiff, Marvin F. Scaife, a citizen of Pennsylvania, sought to recover from the defendants, the Western North Carolina Land Company and Jack Sheehan, certain land originally in the county of Burke, but now in the counties of McDowell and Yancey, in the state of North Carolina. The trial was had in the circuit court of the United States for the Western district of North Carolina. The plaintiff sought to establish title under a grant from the state of North Carolina to Robert and William Tate dated May 20, 1795. The defendant denied that the plaintiff owned the land sued for, and denied that the plaintiff was able to locate any such land as that described in said grant, and showed grants for so much of the land as is claimed by the defendant the Western North Carolina Land Company, made by the state of North Carolina on December 28, 1877, to W. W. Flemming, and a deed from said Flemming therefor to said defendant company dated January 3, 1878. These grants to W. W. Flemming, when taken together, constituted, by adjoining each other, one continuous body of land; and the land covered by them was conveyed by said deed from Flemming in one body, by a description of outside boundary line running around them as one body. The defendant introduced evidence tending to locate the land covered by said deed from Flemming, which was, according to the contention of plaintiff, covered by the Tate grant; and the defendant undertook to show an open, continuous, adverse possession of the land covered by said deed from Flemming by the defendant the Western North Carolina Land Company under that deed for more than 11 years prior to the commencement of this action, under known and visible lines and boundaries. The grants to the Tates covered about 70,000 acres; the grants to Flemming, about 32,000 acres. The action was brought in accordance with a statute of North Carolina which provides "that an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims." The case was tried before the late Judge Seymour and a jury at Asheville in 1896, and it appears from the record in that case that the jury found that the plaintiff had made out his title from the original grantees to himself, and established the boundaries of the land described in the complaint; but inasmuch as the jury found by their verdict that there had been continuous, adverse possession of a part of the land by the defendant company for the period of more than seven years by one Holafield, who held under the defendant company, which had color of title, there was a judgment for the defendant. The case coming to this court by writ of error, a new trial was granted, for reasons set forth in the

opinion, reported in 25 C. C. A. 461, 80 Fed. 352. Upon the second trial, before Judge Purnell and a jury, the following issue was submitted: "Is the plaintiff the owner and entitled to the possession of the land described in the complaint, or any part thereof?" to which the jury answered, "No;" and upon this verdict a judgment in favor of the defendant was entered August 13, 1897. A motion for new trial having been made and refused, the case is here upon a writ of error. The record contains 21 exceptions. There were practically three questions involved: (1) The validity of the Tate grant; (2) the location of the lands; (3) the claim of adverse possession. The form of the issue submitted to the jury, and its response thereto, do not enable us to determine with precision the ground upon which the verdict rested; and as all of the testimony and all of the charge of the presiding judge are not before us, but only so much as is embraced in the voluminous exceptions, it seems impracticable to state the case intelligibly, and, at the risk of some prolixity and repetition, the exceptions will be considered each in its order.

The first assignment of error relates to the exclusion of the testimony of E. L. Greenlee, who was asked what his father, then deceased, had said about a white-oak corner on the Neely tract. It appears that this tract belonged to the grandfather of the witness, and that his father was one of the heirs of the estate. The general rule of law which renders hearsay evidence inadmissible is so far relaxed as to render declarations of deceased persons respecting boundaries admissible, but a prerequisite to their admissibility is that the person should be disinterested. Such testimony is held to be competent because of the presumption that a man will speak the truth when there is no motive to declare the contrary. A man cannot manufacture evidence for himself or for another, and as it appeared that the party at the time the declaration was made was interested, and as it did not appear that it was made *ante litem motam*, there was no error in rejecting it. *Morgan v. Purnell*, 11 N. C. 95; *Hedrick v. Gobble*, 63 N. C. 49.

The second assignment of error relates to the admission of the testimony of one McCoy, who testified respecting a conversation between the father of the witness and one Stepp, who had been examined as a witness in the case. McCoy's testimony tended to contradict Stepp, and the presiding judge held that it was competent for that purpose; and we are of opinion that there was no error in so holding.

The third assignment of error grew out of exceptions to the testimony of McGeorge, and as the presiding judge, later in the trial, ruled out all of this testimony without objection, this disposes of the exception.

The fourth assignment of error, relating to the refusal of the presiding judge to grant the instructions therein set out, is disposed of by his statement that it was not moved in apt time.

The fifth assignment of error relates to the admission of a bill of exceptions in the former trial signed by counsel for the plaintiff and by the presiding judge, wherein it was admitted that S. H. Flemming was the agent of the defendant company. This paper, which is

stated by the court to be a "record in this cause," was offered by the defendant to prove that the plaintiff had admitted Flemming's agency. Admissions by a party are always competent evidence against him, and there seems to be no reason why a distinct and formal admission signed by an attorney of record upon a former trial, and not withdrawn or modified, should not be competent evidence. We are of opinion that there was no error in admitting this record.

The sixth assignment of error embodies two exceptions. The first relates to the submission to the jury to determine as a question of fact what was the indorsement on the original Tate grant. The presiding judge certifies that this paper was submitted to the jury at the plaintiff's own request, the indorsement being "dim with age." Inasmuch as the defendant had objected to the introduction of this paper on the ground that the entry was not genuine, the plaintiff cannot be heard to object to a compliance with his own request that it should be submitted to the jury; and as the presiding judge afterwards charged the jury that, "if the evidence was believed, plaintiff had made out a prima facie title to 70,400 acres of land somewhere," there is no longer any question as to the validity of the Tate grant. The second exception embraced in this assignment of error is that the presiding judge left it to the jury to say what was meant by the call, "West 3,900 poles, crossing the heads of Crabtree and Toe rivers." We are unable to find from the exception or argument what the plaintiff's contention is as to the meaning of these words, or wherein he has suffered injury by having it submitted to the jury, as it was, "whether it crossed the heads of Crabtree alone, and then goes on and crosses Toe river, or whether it means that it crosses the heads of Crabtree and Toe river." It is no contravention of the general rule that the termini and boundaries of a deed is a matter of law, for the court to submit to the jury a question of doubt arising out of the configuration of the country and the character of the natural objects mentioned; and, no injury to the plaintiff being pointed out, we must hold that there was no error in this instruction.

The seventh assignment of error relates to Holafield's possession, and a proper understanding of the questions involved requires a statement of the nature of such possession. It appears from the testimony that one Byrd made an entry of some lands adjoining a tract owned by Holafield. Under the laws of North Carolina an entry is a conditional contract of purchase from the state, which may, within a period fixed by law, be perfected by payment of the purchase money, and by grant. Holafield, in pursuance of a verbal agreement with Byrd for a lease thereof, cleared about an acre of the land adjoining his own, and extended his fence so as to inclose it; subsequently, by additional clearing, inclosing about $2\frac{1}{2}$ acres. He remained in possession several years, paying no rent, but not disputing Byrd's rights, when an agent of the defendant land company came to his house, and claimed that the land belonged to the defendant company; and as agent therefor he gave Holafield a written paper purporting to be a lease for one year, and in consideration thereof Holafield agreed to prevent any encroachment upon the lands of the company, and to report any such to the agent. This paper,

signed by S. H. Flemming, agent, dated April 8, 1883, was offered in evidence, and is set out in full in the former opinion. Subsequently one Houck, who succeeded Flemming as agent, came to Holafield's house; authorized him to clear more land, if he wished, and to take such firewood and rail timber as he wanted. In pursuance of such authority, additional land was cleared, and about six acres in all was thus cleared and inclosed. From the date of this paper to the time of trial, Holafield remained in possession and cultivated the land he had cleared and fenced, acknowledged that he held under the defendant company, and so informed his neighbors. He was told by Byrd that he no longer claimed it, and it does not appear that Byrd, whose entry of the land was nothing more than notice of intention to apply to the state for a grant, ever applied for or received a grant. There was some testimony that Holafield himself had made an entry of this land more than once, but the exact time when such entries were made is not fixed. He is an ignorant man, and there is considerable confusion and uncertainty in his testimony on this point. These entries, whenever made, were never perfected; and his testimony is positive that he never claimed against the defendant company, his services in looking after the timber and preventing trespassing being in lieu of rent. Testimony was offered to show that the land thus occupied was embraced within the boundaries of grant No. 915, which was one of the tracts of land covered by the Flemming grants, and conveyed by him to the defendant company. The same land was also within the boundaries of the Tate grant. The seventh exception contains a long excerpt from the judge's charge, and is in these words:

"The plaintiff, the jury being still at the bar, excepted to the part of the foregoing charge where the court said that if Holafield is in possession of 915, such as described in the opinion of the court of appeals,—actual, not constructive, open, well known, etc.,—his possession would inure to the benefit of the defendant, but not otherwise."

The elaborate argument upon this exception does not seem to us pertinent to it, for so much of the charge as is thus excepted to did not state the extent to which the possession of Holafield would avail the defendant company. Whether it would so far inure to its benefit as to mature title to all of the land claimed by it is not charged, as seems to be assumed in the argument.

It is earnestly contended that Holafield was a tenant of Byrd, and not of the defendant company. According to the testimony, Byrd never had title to the land. His entry was notice of intention to apply for a grant, which gave him certain claims of priority of right to a grant; but, whatever may have been his interest in the land, it seems from the testimony that it had been abandoned before the defendant company leased the land to Holafield. Byrd's rights, whatever their character, were from the state; and, as Holafield went in under him, it would follow that when the state granted the land to Flemming, who conveyed it to the defendant company, it succeeded to the title to which Byrd had an inchoate claim, long since abandoned. That Holafield, after learning that Byrd had failed to perfect his entry, and that the land belonged to the defendant com-

pany, should attorn to it, seemed altogether natural and proper, and it is difficult for us to understand how it can be gravely argued that such attornment is a fraud upon Byrd. If there was anything to create the suspicion that there was a collusive concert between Holafield and the defendant company, whereby Byrd was or might have been defrauded, or if there was any proof that Byrd was asserting any claim to the land, or complaining of any fraud or concealment, it would be our duty to give fuller consideration to the argument; but in the absence of any testimony that Byrd's interest in the land was other than of a fleeting and transitory nature, never perfected and long since abandoned, the discussion, admirable in its ingenuity and exhaustive in its learning, is academic, and it does not seem to be required of us to enter into it.

It is further argued that the "adverse possession of Holafield could only extend beyond the quantity of land mentioned and described in the paper writing from Flemming," which was two and one-half acres. This argument takes no account of the fact that, by agreement with the land company, two or three acres in addition to that originally entered under Byrd's lease, and with which it is not claimed that Byrd had any connection, was taken and held under the defendant company. As before stated, the argument upon this point does not seem to be properly cognizable under this exception, for it does not appear in any part of the charge excepted to that the extent to which the possession of Holafield would inure to the benefit of the defendant company was stated; but, inasmuch as the subject has been fully discussed on both sides, it may be as well to state what we conceive to be the law. It is a fundamental principle that the right to hold land, its descent, devise, alienation, and transfer, and the mode of acquiring title, depend upon the law of the state where the land is situate. In this case, therefore, the laws of North Carolina must govern. When it was here before, the judgment of the court below resting upon the verdict as to Holafield's possession, it was the opinion of this court that the trial judge had omitted to instruct the jury as fully as the law required concerning the nature of an adverse possession; and as the facts disclosed in that record raised a question whether the possession of a minute portion of a large body of land was of that open, actual, and notorious character which would put upon inquiry an owner of reasonable diligence and ordinary vigilance, and thus put in motion the statute of limitations against him, it was determined that a new trial should be granted. It is not claimed that there was any failure upon the part of the presiding judge on the last trial to make plain to the jury the nature and kind of adverse possession which sufficed to mature title against the true owner. His charge upon that point was in the very language of this court, which did nothing more than embody what was conceived to be the well-settled law upon the subject, and the clearness and force with which he presented it to the jury is unassailable, and not excepted to.

The controversy is between the plaintiff, claiming under the Tate grant, and the defendant company, claiming under the Flemming grants. The Tate grant being the older, the plaintiff unquestionably

had the superior title. Although it does not appear in the record that there was any proof of possession, no such proof was necessary; for possession follows the title, and all the presumptions are in favor of the true owner. He was in constructive possession; that is, he had that possession which the law gives to the owner by virtue of his title only. The defendant company having color of title under the Flemming grants to a large body of land embraced within the boundaries of the Tate grant, this action was brought, under the statutes cited, against it and its tenant Sheehan for the purpose of settling the question of title; and the defendant undertook to prove actual, adverse occupation of a part of this land for the period which under the statute of North Carolina was sufficient to mature title against the true owner by its tenant Williams, the nature of whose holding does not appear in the record, and by its tenant Holafield, the character of whose possession has been already stated. That an actual, open, notorious, continuous, uninterrupted, exclusive, and unequivocal adverse possession of a very small part of a large body of land will mature title to the whole tract embraced within the boundaries of the adverse holder's claim seems to be well settled in North Carolina. Its great chief justice, in *Lenoir v. South*, 32 N. C. 237, said:

"It may seem at first view a great hardship on the owner of wild land, situate as this is, and perhaps at a distance from him, to lose his title by reason of a possession of which he probably would not, and here certainly had not, early knowledge. But the law cannot suppose that an owner will not look to the condition of his property, at least so far as to discover an intruder within the period of seven years, and take the necessary steps to assert his own rights; and therefore an omission to do so must amount to the laches for which the law deprives him of his entry, and vests the title in the possessor. It follows from these observations that the instructions given to the jury were as favorable to the plaintiff as they well could be. Indeed, it is not easy to comprehend what is meant by a 'clandestine possession of seven years.' One may enter clandestinely or by a trick; but when he is once in, and continues there, claiming to hold the land as his own, the possession, it would seem, cannot, in its nature, be secret, but is necessarily visible. There can be no question of the object of the defendant in taking possession, nor of its character throughout,—that it was adverse. It was plain, indeed, that he hoped the lessor of the plaintiff would neither see it nor be informed of it until it should ripen his title, but that can make no difference; for, in its nature, the defense of the statute of limitations is a protection against the title, and it has never been held that the possessor must give notice of his claim otherwise than by that most effective notice to an owner of ordinary vigilance, namely, the possession itself. As that existed in fact, and spoke for itself, so that the lessor of the plaintiff could not have been mistaken either as to the fact of the possession or its character, if he had gone to the place, or otherwise had kept due oversight of his land, there is no ground on which the operation of the statute can be impeded; for there is no doubt that the possession of the defendant was from the beginning such as made him liable to an ejectment, and, if so, that determines the question."

It is contended that at the most the claim of adverse possession would be limited to the boundaries of grant No. 915, within which lay Holafield's farm. Such would be the case had Flemming conveyed to the land company the separate parcels granted to him, and each separate tract had its own specific metes and bounds, for the rule with respect to adverse possession is that possession on one

tract of land does not extend to or mature title in a contiguous tract; but it appears from the deed under which defendant company holds that all of the grants to Flemming were embraced in a single boundary, and they seemed to adjoin each other and form a connected body of land; and the Code of North Carolina (section 1277) makes special provision for including in one common survey several tracts of contiguous and adjoining land, and makes possession of any part of the lands covered by such common survey possession of the whole or every part thereof. The record does not show that any special instruction was asked on this point, nor is there any exception to any part of the charge relating to the separate tracts, and we have not before us any testimony concerning the same; but the embracing of all the separate parcels in one deed under a common boundary would seem to indicate the owner's intention to accomplish the purpose of the statute, and to hold this body of land as an entirety. The consolidation of the grants by Flemming in his deed of conveyance, and the description by a common boundary, show such intention, and there is no countervailing evidence. We are of opinion that there is no error in the charge as set forth in the seventh exception.

The eighth assignment of error is to the refusal of the presiding judge to give the special instruction prayed by the plaintiff, to the effect that there was no sufficient evidence to show Samuel H. Flemming's authority to lease any of the lands for the defendant company. We have already referred to the evidence on that point, and are of opinion that there was no error in submitting the question to the jury. As to so much of the prayer as relates to the lease to Williams, and his attornment under threat of suit, there is no evidence before us in the bill of exceptions regarding the nature of Williams' possession, and it is impossible, therefore, for us to consider it; and for the same reason we are unable to appreciate the effect of the modification of the prayer for instructions which is the basis of the ninth assignment of error.

The tenth assignment of error is to the granting of the instruction prayed by the defendant, which was "that the plat attached to the grant to the Tates cannot control the calls of the grant itself, and, wherever they differ from the calls of the grant, the grant must control, in determining the location of the land granted in the grant," which the court gave, with the remark, "The court gives you that, with the charge already given you." In his general charge the court had instructed the jury "that, in resolving a doubt or ambiguity in a deed or grant, you have the right to call to your assistance the plat made by Henry at the time the grant was issued." That a plat may be used to correct a mistake in a grant is well settled by the cases cited by the plaintiff in error, and so the presiding judge, in effect, charged; but no case has been cited to the effect that the plat may control the grant. The case of *Hurley v. Morgan*, 18 N. C. 432, is direct authority to the converse. It is the grant that passes the title, and it must control, if it is certain. It is only when it is ambiguous that the plat usually annexed to it may be referred to, to resolve the ambiguity or to correct the mis-

take. Taken in connection with the general charge, there is no error in the instruction.

The eleventh, twelfth, and thirteenth assignments of error relate to the instructions to the jury as to the rules which should govern them in the location of the grants. As general propositions of law, they seem to be well supported by the cases cited by defendant's counsel; and the plaintiff has not pointed out, and we cannot see, how, in any aspect of the case, he has suffered injury therefrom.

The fourteenth assignment of error is that the court erred in giving this instruction:

"Where the title deeds of two rival claimants of land lap upon each other, and the claimant under the junior title, or his agents or lessees, is in possession of a part of the lap, and the other claimant is not in the possession of any of the lap, the possession of the entire lap is in the claimant under the junior title. It makes no difference how small the possession may be in the junior grantee or his tenant; if it has continued for seven years prior to the commencement of this suit, such possession has vested the title to the entire lap in him who originally had the junior title."

The said judge read this special instruction to the jury, and remarked to the jury:

"The court gives you that as modified by the charge. It is laid down in the decision of the supreme court, and almost in the very words."

In so far as the exception goes to the special instruction, it seems to be answered by the case of *McLean v. Smith*, 106 N. C. 172, 11 S. E. 184, but it appears that the instruction was given "as modified by the charge." The charge is not before us, and we cannot know what the modification was. If there were other persons in possession of any part of the lap, there should have been a modification of the charge to meet that state of facts. The record contains no evidence on that point. We cannot assume that there was such testimony, and that the presiding judge failed to modify his charge to meet that exigency.

The fifteenth assignment of error is to the giving of the following special instruction:

"If the jury shall find that the defendant the Western North Carolina Land Company put the witness Bynam Holafeld in possession, for it or under it, of any part of the land claimed by it, and being part of the land purporting to be conveyed by W. W. Flemming to it by the deed from said Flemming offered in evidence by it, and afterwards permitted said Holafeld to continue so to occupy the said part of said land for it or under it, and that under such putting in possession and permission said Holafeld occupied said part of said land for as much as seven years at any time or in any period before the commencement of this suit, in November, 1894, there being no evidence that during any part of that time the plaintiff was in possession of any part of the land so claimed by said defendant, and the jury shall further find that said part of said land is also a part of the land claimed by the plaintiff, and a part of the lap covered by both the title of the said defendant and the title of the said plaintiff, then in such case the possession of said part of said lands by said Holafeld would ripen the title of the said defendant to the entire lap; and the jury should in that case answer the first issue, 'No.'"

The said judge read said special instruction to the jury, and remarked to the jury:

"The court gives you that, with the explanation already given you as to what 'adverse possession under color of title' means."

We are of opinion that this special instruction would be obnoxious to just criticism, if it stood alone; but the presiding judge says that it was allowed, with the "explanation already given," etc. Without having the full charge before us, we cannot say that the explanation was insufficient. In so far as we can judge of it from the excerpts which appear, we think it fairly to be presumed that his explanation of the nature of adverse possession in connection with the Holafield land was sufficiently full and complete to leave the jury in no doubt as to the character of the adverse possession which was necessary to mature title.

The sixteenth assignment of error is to the giving of the following special instruction:

"If the plaintiff would recover the land sued for in this action, he must not only show title in himself to the land claimed by him, but he must also show with certainty that the land which he claims is the land covered by his title papers. To do this last, he must show to the satisfaction of the jury, by a preponderance of the evidence, the exact location of the land described in his title papers, so as to enable the jury to determine in their verdict the precise position of its boundaries. If, therefore, he has left the matter of the exact places of such boundaries in doubt, so that the evidence does not enable the jury to locate them and to determine their exact position with certainty, the jury should answer the first issue in the negative. If, upon the evidence, the minds of the jury are left evenly balanced between two or more attempted or possible locations of such boundaries, it is their duty to answer the first issue in the negative."

The judge read said special prayer to the jury, adding the words "with reasonable certainty" after the words "but he must allow," and adding the word "reasonable" after the words "position with" and striking out the words "precise and exact," and remarked to the jury:

"The words 'exact and precise' have no business there. The last paragraph of that instruction is refused, but the others given. Plaintiff must locate the land with reasonable certainty. The law does not require the exact location, nor the precise position. The substance of the instruction the court gives you as it has already done."

The exception is to the giving of a "special instruction" which the record shows was not given. The instruction was materially modified, and it does not appear that any exception was taken to it as it was given. There is some criticism in the argument of the last paragraph, which the presiding judge refused to give. Counsel say that "there are no paragraphs in the instruction, and it is difficult to see what it means." We have no such difficulty. If it had been given as prayed, it would not have been error; for, the plaintiff being the actor, the burden was upon him to establish with reasonable certainty the location of his land, and, if he could not do so by preponderance of evidence, the verdict would have to be against him.

The seventeenth assignment of error relates to an instruction which is supported by *Harry v. Graham*, 18 N. C. 76; *Ring v. King*, 20 N. C. 164.

The eighteenth and nineteenth assignments of error relate to the possession of Samuel Williams of a part of the land covered by the deed from Flemming to the defendant company. No testi-

mony concerning the nature of Williams' possession is in the record, but inasmuch as it appears that the presiding judge had in his general charge fully instructed the jury that the adverse possession required to mature title must be actual and exclusive, and had more than once explained the nature of adverse possession, citing the opinion of this court upon that subject, and in giving the special instruction had added that it was given with the modification included in his general charge, it seems to us that the exceptions are not well taken.

The twentieth and twenty-first assignments of error relate to instructions concerning the effect of adverse occupancy by a tenant. These instructions, modified as they were, are in accord with the principles which we have hereinbefore held to govern cases of this nature. It would swell this opinion to undue proportions to cite the numerous cases decided in North Carolina since *Lenoir v. South* in which the principles there laid down are approved. *McLean v. Smith*, 106 N. C. 172, 11 S. E. 184; *Brown v. Brown*, 106 N. C. 460, 11 S. E. 647; *Hamilton v. Ickard*, 114 N. C. 537, 19 S. E. 607; *Shaffer v. Gaynor*, 117 N. C. 21, 23 S. E. 154,—are among them; and it may be considered as settled in that state that a tenant who holds continuous, open, notorious, and unequivocal adverse possession of a definite boundary, however small, in a large tract of land, holds possession for his lessor, and his possession inures to the benefit of the lessor as to the whole of the land covered by the deed under which he claims title. This action is predicated upon the assumption that such is the law; for in joining Sheehan, a tenant of the defendant company, with the defendant land company, the plaintiff claimed the right, because of Sheehan's possession, to a judgment for the entire body of land to which he claimed title under the Tate grant. He has had two trials, and in both the verdict has gone against him. When the entire testimony and the entire charge are not before the appellate tribunal, there is always a presumption that the judge below gave the instructions properly applicable to the facts as disclosed by the evidence; and although certain portions of the charge, apart from the context, may appear obnoxious to criticism, yet, viewing it as a whole in so far as we can form an opinion of it from the excerpts presented in the record, our conclusion is that the case was fairly presented to the jury, and the judgment of the circuit court is accordingly affirmed.

IN re CLERKSHIP OF CIRCUIT COURT IN EASTERN AND WESTERN
DIVISIONS OF SOUTHERN DISTRICT OF IOWA.

(Circuit Court, S. D. Iowa. November 5, 1898.)

CLERK OF CIRCUIT COURT—SOUTHERN DISTRICT OF IOWA—POWER OF APPOINTMENT.

The act of June 4, 1880 (21 Stat. 155. c. 120), provided for the holding of the circuit court at each of the places where the district court was then held in the district of Iowa, and made the clerk of the district court also the clerk of the circuit court at all places except at Des Moines, where the circuit court for the entire district had theretofore been held and there

was a circuit court clerk. By the act of July 20, 1882 (22 Stat. 172, c. 312), the state of Iowa was divided into two districts, the Southern district being divided into the Eastern, Central, and Western divisions, the court for the Central division of which was held at Des Moines. It was further provided that the persons then acting as clerks in the district of Iowa should be the clerks for the Southern district. In 1889, congress passed an act (25 Stat. 655, c. 113), section 3 of which provided that "hereafter all appointments of clerks of circuit courts of the United States shall be made by the circuit judges of the respective circuits in which such circuit courts are or may be hereafter established; and all provisions of law inconsistent herewith are hereby repealed." *Held*, that the act of February 6, 1889, granted the power to appoint the clerks of the circuit courts to the circuit judges exclusively, and repealed all laws inconsistent with the grant or exercise of that power; and every law, whereby the right to exercise any of the powers or to discharge any of the duties of a clerk of a circuit court was made to depend upon a subsequent appointment to any office made by any other than a circuit judge, was inconsistent with the grant which that act contained, and ineffective from the date of its enactment.

This was a proceeding to determine the right of John J. Steadman, clerk of the district court of the United States in the Southern district of Iowa, to the office of clerk of the circuit court in the Eastern and Western divisions of said district.

A. B. Cummins, for E. R. Mason.

James C. Davis, for John J. Steadman.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The Southern district of Iowa is divided into three divisions for judicial purposes,—the Central, the Eastern, and the Western. In the Central division the United States circuit and district courts are held at Des Moines, in the Eastern division they are held at Keokuk, and in the Western division they are held at Council Bluffs. It is conceded that Edward R. Mason is the clerk of the circuit court for the Central division, but he and John J. Steadman each claim to be the clerk of this court for the Eastern and Western divisions of this district. They have agreed that no claim is or will be presented by either of them for fees or emoluments received or collected by the other while discharging the duties of the office prior to the filing of this opinion, so that the only question for our consideration is, who is entitled to discharge the duties and receive the emoluments of this office in the future? and we are relieved from the task of determining the rights of these claimants in the past.

Prior to June 4, 1880, the state of Iowa constituted a single judicial district, which was divided into the Northern, Central, Western, and Southern divisions, and the district court for these divisions was held at Dubuque, Des Moines, Council Bluffs, and Keokuk, respectively, but the circuit court for the entire district was held at Des Moines, and Edward R. Mason was its clerk. Rev. St. §§ 537, 572, 658. In 1880 congress passed an act which provided that the circuit court for the district of Iowa should thereafter be held at the places where the district court was held, and "that the clerk of the district court shall be the clerk of the circuit court at all the places where

the same is held in said district, except at Des Moines." Act June 4, 1880 (21 Stat. 155, c. 120) §§ 1, 2; 1 Supp. Rev. St. p. 290. In 1882, congress divided the state of Iowa into the Northern and Southern districts; divided the Southern district into the Eastern, Central, and Western divisions; and provided that the district judge, district attorney, and marshal of the district of Iowa should be the district judge, attorney, and marshal of the Southern district of Iowa, and "that there shall be appointed by the judge of the Northern district of Iowa with the approval of the circuit judge of the Eighth judicial circuit a clerk for the district and circuit courts in and for the said Northern district of Iowa. The persons now acting as clerks for the district of Iowa shall be the clerks for the Southern district of Iowa." Act July 20, 1882 (22 Stat. 172, c. 312) § 4; 1 Supp. Rev. St. p. 358. At the time of the passage of the act of 1880, H. K. Love was the clerk of the district court for the district of Iowa, and from that time until he died, in 1891, he acted as clerk of the circuit court for those divisions of the district of Iowa, and of the Southern district of Iowa, in which the court was held, at Council Bluffs and Keokuk, respectively, while Edward R. Mason remained the clerk of the circuit court for the division in which that court was held at Des Moines. After the death of Love, and on February 15, 1892, the district judge of the Southern district of Iowa appointed John J. Steadman clerk of the district court for that district. Under this appointment, he entered upon the discharge of the duties of the clerk of the circuit court for the Eastern and Western divisions of the district, and has continued in their discharge to the present time. He maintains that under the acts of 1880 and 1882 he is entitled to discharge these duties and to receive the emoluments of this office, in the future as he has in the past.

In 1889 congress passed an act by which it established circuit courts for the Western district of Arkansas, the Northern district of Mississippi, and the Western district of South Carolina, and repealed the laws which had conferred circuit court powers upon the district courts of these districts, and upon the district courts of West Virginia, and of the Eastern district of Arkansas, at Helena. 25 Stat. 655, 656, c. 113, §§ 1, 5; 1 Supp. Rev. St. p. 638. Section 3 of this act provided that the circuit judge of the circuit in which each of the circuit courts thereby established was situated should appoint a clerk of such circuit court, and closed with these words: "Hereafter all appointments of clerks of circuit courts of the United States shall be made by the circuit judges of the respective circuits in which such circuit courts are or may be hereafter established; and all provisions of law inconsistent herewith are hereby repealed." One of the claims of Mason is that the acts of 1880 and 1882, conferring the powers of the clerk of the circuit court upon the clerk of the district court, are inconsistent with the power of appointment of the clerk of the circuit court vested in the circuit judges by this act of 1889, and that, since Steadman has never received any appointment from the circuit judges, the office of clerk of the circuit court in the Eastern and Western divisions of this district is either vacant, or he (Mason) is the incumbent under his appointment as clerk of the circuit court of the original

district of Iowa. On the other hand, counsel for Steadman insist that the acts of 1880 and 1882 are special laws; that they give no power of appointment of the clerk of the circuit court to the district judge; that their only effect is to add the duties of the clerk of the circuit court to those of the clerk of the district court in these two divisions of the district; that there is nothing in this inconsistent with the grant of the power of appointment of the clerk of the circuit court to the circuit judges by the general law of February 6, 1889, and that, under the familiar rules of construction that repeals by implication are not favored, that two acts upon the same subject must stand together if possible, and that privileges granted by special act are not affected by inconsistent general legislation, but the special act and the general laws must stand together, the one as the law of the particular case and the other as the general law of the land (*Henderson's Tobacco*, 11 Wall. 653, 657; *Gowen v. Harley*, 6 C. C. A. 190, 196, 56 Fed. 973, 979, and 12 U. S. App. 574, 584), the acts of 1880 and 1882 are still in force, and the clerk of the district court is rightfully exercising the powers of the clerk of the circuit court thereunder. The question in this case, however, is not whether the act of 1889 repeals the acts of 1880 and 1882, or any part of either of them, by implication, but whether or not it does so by its express terms.

The concession may be made that general legislation inconsistent with existing special laws does not ordinarily repeal or affect them. It is none the less true that by express reference to them it may do so. The act of 1889 expressly repeals all provisions of law inconsistent with its declaration that after its passage all appointments of clerks of the circuit courts shall be made by the circuit judges. Is not a provision of law which confers the powers and emoluments of the clerk of the circuit court in the major part of a district, upon an appointee of another, inconsistent with the unlimited power of appointment of the clerks of the circuit courts granted to the circuit judges by the act of 1889? This is the crucial question in this case, and in considering it, and determining the scope and effect of the act of 1889, we must not lose sight of the fact that the sole object to be sought in the interpretation of a law is the intention of the legislative body which enacted it, and that rules of construction are only serviceable as they assist us to attain that object. *Kohlsaat v. Murphy*, 96 U. S. 153, 160. It is always difficult, and often impossible, to correctly construe a statute without a full knowledge of the existing legislation upon its subject when it was enacted, and of the evil it was passed to prevent or remove. Without this knowledge, the subjects considered, and the purposes present in the minds of the legislators, may be unperceived, and the intent with which they acted may be mistaken. No rule of construction, no course of proceeding, is more helpful to a court, in rightfully interpreting a law, than to put itself in the place of the legislative body which passed it, at the time of its enactment, with a complete knowledge of the legislation on its subject at that time, and then to seek, in the light of that legislation, the purpose for which it was passed and the evil it was intended to remedy. If, when this is done, its terms fairly express that purpose, and are suited to its accomplishment, its construc-

tion is no longer doubtful. The history of the legislation on the subjects of the act of 1889, before its passage, and the condition of the laws on these subjects at the time of its enactment, will be found of material assistance in determining its meaning and its purpose.

The act treats of two subjects,—the circuit-court powers of district courts, and the appointment of the clerks of the circuit courts. Prior to 1889, it had been a common practice of congress to confer upon district courts some of the powers of the circuit courts in their respective districts. Prior to 1837 such powers had been conferred by various acts upon the district courts of Indiana, Illinois, Missouri, Arkansas, the Eastern district of Louisiana, the district of Mississippi, the Northern district of New York, the Western district of Virginia, the Western district of Pennsylvania, and the districts of Alabama. By the act of March 3, 1837, these powers were revoked. 5 Stat. 177, c. 34, § 3. In 1838 circuit-court powers were again granted to the district court of the Western district of Virginia (5 Stat. 215, c. 46, § 1); in 1839 such powers were conferred upon the district court of the Northern district of Mississippi (5 Stat. 317, c. 27, § 1); in 1851 upon the district court for the Western district of Arkansas (9 Stat. 595, c. 24, § 3); and in 1856 upon the district court of South Carolina which sat at Greenville (11 Stat. 43, c. 119, § 3). In 1848 circuit-court powers were conferred upon the district court of the Northern district of Georgia (9 Stat. 281, c. 51, § 8), but they were revoked by an act of June 4, 1872 (17 Stat. 218, c. 284, § 1). The provisions of the acts giving circuit-court powers to district courts which had not then been repealed were embodied in section 571 of the Revised Statutes. On January 31, 1877, this section was so amended as to provide that the district courts of the Western district of Arkansas, the Eastern district of Arkansas at Helena, the Northern district of Mississippi, the Western district of South Carolina, and the district of West Virginia (formerly the district court of the Western district of Virginia), should have and exercise certain circuit-court powers. 19 Stat. 230, c. 41; Rev. St. § 571. The courts mentioned in this amendment of 1877 were the only district courts of the states which had or exercised circuit-court powers when the act of February 6, 1889, was passed. That act abolished these powers, and expressly repealed all the laws then in force which had conferred them, so that, from the time of its approval, there was no district court in any state in the Union which could exercise the powers of a circuit court. Act Feb. 6, 1889 (25 Stat. 655, 656, c. 113) §§ 1, 5; 1 Supp. Rev. St. p. 638. A diligent examination of the subsequent acts of congress has disclosed no act in which such powers have since been granted to a district court. It is therefore plain that one of the purposes of congress in the passage of the act of 1889 was to draw the same line of demarkation between the jurisdiction and powers of the circuit and district courts in every state in the Union, so that the practice might be uniform throughout the Nation, and that the jurisdiction and powers of these courts should be distinct and separate, wherever they exist. It must be conceded that this act of 1889 completely accomplished this purpose.

We turn to the consideration of the other subject treated in this

statute,—the appointment of the clerks of the circuit courts. By the judiciary act of 1789 the clerks of the district courts were made ex officio clerks of the circuit courts in their respective districts. 1 Stat. 76, c. 20, § 7. In 1839 congress provided “that all the circuit courts of the United States shall have the appointment of their own clerks; and in case of a disagreement between the judges, the appointment shall be made by the presiding judge of the court.” 5 Stat. 322, c. 36, § 2. In “An act to amend the judicial system of the United States,” approved on April 10, 1869, this section appears:

“Sec. 3. Be it further enacted that nothing in this act shall affect the powers of the justices of the supreme court as judges of the circuit court, except in the appointment of clerks of the circuit courts, who in each circuit shall be appointed by the circuit judge of that circuit and the clerks of the district courts shall be appointed by the judges thereof respectively: provided, that the present clerks of said courts shall continue in office till other appointments be made in their place, or they be otherwise removed.” 16 Stat. 45, c. 22, § 3.

Congress subsequently provided, by special acts, that the circuit and district judges of the district of Wisconsin should appoint two clerks, one of whom should reside and keep his office at Madison, and the other at La Crosse, each of whom should be the clerk of both the circuit and district courts (Act June 30, 1870 [16 Stat. 172, c. 175] § 9); that the circuit and district judges of the Western district of Virginia should appoint four clerks, who should reside and keep their offices, respectively, at the four places of holding these courts in that district, each of whom should be the clerk of the circuit and district courts (Act Feb. 3, 1871 [16 Stat. 404, c. 35] § 9); and that the circuit and district judges of the district of North Carolina should appoint three clerks, who should reside and keep their offices at Statesville, Asheville, and Greensboro, respectively, each of whom should be the clerk of both the circuit and district courts (Act June 4, 1872 [17 Stat. 217, c. 282] § 9). These provisions of the acts of congress were carried forward and embodied in sections 619, 621, 622, and 623 of the Revised Statutes. In 1878, section 619 was amended, by a clause inserted in the act making appropriations for the executive, legislative, and judicial expenses of the government, so that it read:

“All the circuit courts of the United States shall have the appointment of their own clerks, the circuit and district judges concurring; and in case of a disagreement between the judges the appointment shall be made by the associate justice of the supreme court allotted to such circuit, except in cases otherwise specially provided for by law.” 20 Stat. 204, c. 329.

In 1880 and 1882 the acts respecting the appointment of the clerks of the circuit courts in the districts of Iowa, which we have quoted in the earlier part of this opinion, followed, and then came the act of 1889.

We have now briefly reviewed the history of the legislation upon the subject under consideration, and stated the effect of every statute upon this subject which was in effect when the act of 1889 was passed. Conceding that the effect of the acts of 1880 and 1882 was to confer upon any person who had been, or thereafter might be, appointed clerk of the district court for the Southern district of Iowa, the powers and emoluments of the clerk of the circuit court in the East-

ern and Western divisions of that district, as the counsel for Steadman claims, this was the legislative situation: Congress had provided by a general law, in 1839, that the circuit courts should appoint their own clerks. In 1869 it had provided, by another general law, that each circuit judge should appoint the clerks of the circuit courts in his circuit. Subsequently, by special acts, the clerks of the district courts were made the clerks of the circuit courts in the Eastern and Western divisions of the Southern district of Iowa, in the Northern district of Iowa, in the district of Wisconsin, in the Western district of Virginia, and in the district of North Carolina; and the power of appointment of the clerks of the circuit courts was conferred upon the district judge alone in the Eastern and Western divisions of the Southern district of Iowa, while in the Northern district of Iowa, in the district of Wisconsin, in the Western district of Virginia, and in the district of North Carolina, by virtue of special laws, and in all the other districts, by the general law of 1878, it was vested in the circuit and district judges acting together. In other words, the district judge was authorized to name the person who should discharge the duties and receive the emoluments of the clerk of the circuit court in the Eastern and Western divisions of the Southern district of Iowa without the consent or concurrence of the circuit judges, while the circuit judges had no power to appoint a clerk of any circuit court in any district in the Nation without the concurrence of the district judge of that district. Then came the act of 1889, with its declaration that "hereafter all appointments of clerks of circuit courts of the United States shall be made by the circuit judges; * * * and all provisions of law inconsistent herewith are hereby repealed."

We are now prepared to consider the question at issue in this case: Was not the provision that a district judge might appoint a clerk of the district court, who should discharge the duties and receive the emoluments of the office of the clerk of the circuit court in the Eastern and Western divisions of this district, inconsistent with the grant to the circuit judges of the unlimited power of appointment of that clerk made by the act of 1889? The somewhat careful and extended consideration that has been given to this act, its scope, and probable purpose, in the light of the previous legislation on its subjects, to which reference has been made, seems to lead almost inevitably to the conclusion that this question should be answered in the affirmative. The argument that the acts of 1880 and 1882 are not inconsistent with the grant of the power of appointment made by the act of 1889, because they do not authorize the appointment of a clerk of the circuit court by a district judge, but simply add, to the duties and emoluments of the clerk of the district court, those of the clerk of the circuit court for these two divisions of the district, proves too much. If it were sound, an act which conferred all the powers and emoluments of the clerk of the circuit court in a given district upon the clerk of the district court, or one that bestowed all the powers and emoluments of all the clerks of the circuit courts upon the respective clerks of the district courts, would not be repugnant to that grant, and, under such a construction, it might become "as idle

as a painted ship upon a painted ocean." That was not the intention of congress when it enacted this law. When it passed the act of 1878, it saved from repeal the special acts regarding the appointments of the clerks of the circuit courts which were then in force by the express provision that the power of appointment there given should take effect, "except as otherwise specially provided for by law"; but, when it passed the act of 1889, it clearly indicated its intention to strike down all other methods of appointment, and to vest the power in the circuit judges exclusively, by the sweeping declaration that all appointments should thereafter be made by them, and by the express provision that all laws inconsistent with that declaration should be repealed. When this act is read in the light of the legislation on this subject in force when it was passed, and in the light of this express provision for the repeal of inconsistent laws, the intention of congress to revoke the authority of the district judges to appoint or to participate in the appointment of the clerks of the circuit courts, and to vest that power of appointment uniformly and exclusively in the circuit judges, shines as clearly through it as does its purpose to revoke the circuit powers of the district courts, and to vest them uniformly in the circuit courts. The act of February 6, 1889, granted the power to appoint the clerks of the circuit courts to the circuit judges exclusively, and repealed all laws inconsistent with the grant or exercise of that power. Every law, whereby the right to exercise any of the powers or to discharge any of the duties of a clerk of a circuit court was made to depend upon a subsequent appointment to any office made by any other than a circuit judge, was inconsistent with the grant which that act contained, and ineffective from the date of its enactment. The appointment of Steadman, in 1892, as clerk of the district court, by the judge of that court, gave him no lawful authority to exercise the powers, or to receive the emoluments, of the clerk of the circuit court in any of the divisions of the Southern district of Iowa. He has not been and is not the clerk of the circuit court de jure in these divisions, but he has been and is so de facto, and his acts as such are as valid and conclusive, upon all who have not called his title to the office in question by quo warranto or other like direct proceeding, as though he had rightfully held his office.

The next question which would naturally arise here is whether or not Mason has been entitled to the emoluments of this office while Steadman has been its apparent incumbent; but the agreement of the parties, that neither claims restitution from the other, makes this an academic question, and we have not considered it. The only practical question is, who shall exercise the powers of this office in the future? Since the power of appointment rests in us, we shall solve this question by exercising it. Steadman may continue to act as clerk of the circuit court de facto for the Eastern and Western divisions of the district until January 1, 1899, and Mason will be appointed clerk of the circuit court for the entire district, expressly including the Eastern and Western divisions thereof, and his appointment will take effect on January 1, 1899.

UNITED STATES v. LEE.

(Circuit Court, N. D. Georgia. November 10, 1898.)

OFFENSES AGAINST POSTAL LAWS—INTERFERENCE WITH PACKAGE BEFORE DELIVERY—WHAT CONSTITUTES DELIVERY OF LETTER.

A letter directed to a person, "care Kimball House," when delivered by a postal carrier at the office of the Kimball House, is "delivered to the person to whom it was addressed," within the meaning of Rev. St. § 3892; and the duty of the postal authorities with respect to such letter having been fully performed, in accordance with the direction of the sender, a subsequent wrongful taking of such letter by another is not an offense under said section, nor one cognizable by the courts of the United States.

This is a prosecution under Rev. St. § 3892, for violation of the postal laws. Heard on demurrer to the indictment.

E. A. Angier, U. S. Atty.

F. A. Arnold, for defendant.

NEWMAN, District Judge. The indictment in this case, together with the admission of the United States attorney in open court, and the demurrer to the indictment, raise this question: Where a letter is directed to "L. B. Price, care Kimball House, Atlanta, Ga.," and the letter is delivered at the office of the Kimball House, is in the office of the hotel awaiting delivery to Price, and the letter is unlawfully, wrongfully, and fraudulently taken therefrom and secreted, is the person taking the same subject to indictment and punishment, under section 3892 of the Revised Statutes of the United States? If the letter in this case had been "delivered to the person to whom it was directed," the taking of the same, no matter how wrongful or unlawful the act, would clearly not be an offense within this statute. The only information or direction received by the postal authorities as to how and where a letter shall be delivered is from the sender. Where the sender directs the letter to the care of another person, it is, in effect, a direction that the letter shall be delivered to A. for B.; and, when the delivery is made by the post-office employés to A., it is delivered as the postal department is instructed to deliver it, and therefore, when handed to and received by A., it is a delivery to the person to whom it is addressed. The duty of the postal authorities is discharged when they comply with the instructions of the sender, and deliver the letter to the designated person or at the designated place. Where the duty of the post-office department ends, it would seem that its protection generally would end also.

It is said that some importance should be attached to the use of the word "person" as to the delivery of the letter, and that the Kimball House is not a person. The delivery of the letter to the Kimball House was its delivery to Price. Such were the directions of the sender,—that it should be delivered to the Kimball House for Price; and this was done. To my mind, if an offense has been committed in connection with this letter, it is a violation of the state law, and is not within federal cognizance, certainly not under the statute on which the indictment is based. The case of *U. S. v. McCready*, 11 Fed. 225, decided by Judge Hammond in the Western district of Tennessee, and

the case of *U. S. v. Safford*, 66 Fed. 942, decided by Judge Priest for the Eastern district of Missouri, are interesting cases in this connection. While in neither case are the facts exactly like the facts here, in both cases there is a discussion of most of the pertinent authorities which it is believed support the conclusion reached in this case. With the admission of the district attorney that the letter in this case had been delivered at the office of the Kimball House, and was there when stolen, I must hold that no case is made which would authorize a prosecution under section 3892, Rev. St.

UNITED STATES v. KENNEY.

(Circuit Court, D. Delaware. July 22, 1898.)

1. VIOLATIONS OF NATIONAL BANK LAWS—INTENT TO DEFAUD.

An intent to injure or defraud a national bank within the meaning of section 5209 of the Revised Statutes of the United States does not necessarily involve malice or ill-will toward the bank. The law presumes that every sane person, who has attained the age of discretion, contemplates and intends the necessary or natural consequences of his own acts; and it is sufficient that the unlawful intent is such as, if carried into execution, will necessarily or naturally injure or defraud the bank.

2. SAME.

The indictment having charged that the defendant, with intent to injure and defraud a national bank, wilfully, unlawfully and fraudulently aided and abetted its paying teller to misapply its moneys, in violation of section 5209, by means of divers checks drawn by the defendant on the bank when he had no funds or insufficient funds on deposit to meet them, the defendant cannot be convicted unless he had a wrongful or illegal intent to injure or defraud the bank in drawing the checks or some one or more of them. Whether or not he had that intent is to be determined by the facts and circumstances and the surroundings at the time he drew the checks. If at that time he knew or had good reason to believe that they or any of them were to be fraudulently paid by the teller out of the funds of the bank, and not out of any funds to which the defendant could legitimately resort, he had the guilty intent; and although it may have been the intention of the defendant at the time he drew such checks finally to recompense or remedy the injury resulting from his act to the bank, such an intent to correct the wrong would not absolve him from guilt. Nor would the fact, if fact it be, that he hoped through successful operations in stocks or other property, or otherwise, to be placed in a position to restore to the bank moneys wilfully misapplied through his wrongful act be any answer to the charge of criminality. No man is permitted to aid or abet the wilful misapplication of the funds of a national bank because he hopes in the future to repair his wrong.

3. SAME—OVERDRAFTS—CONCEALMENT FROM BANK OFFICERS—COLLUSION WITH TELLER.

If there was a fraudulent scheme, understanding or agreement between the defendant and the paying teller that checks drawn by the defendant on the bank in favor of a firm of stock brokers, for the benefit and advantage of the defendant, were to be paid by the teller out of the funds of the bank when the defendant had no funds or only insufficient funds to his credit or was overdrawn in his account, and that such checks were not to be charged in the defendant's account, but were to be fraudulently concealed from the proper bank officials, until the defendant should make deposits sufficient to meet them, the defendant had a guilty intent to injure or defraud the bank. For such scheme, understanding or agreement, if carried out, involved a fraudulent and wilful misapplication of

the moneys of the bank to the amount of such checks, and wrongfully and unlawfully deprived the bank of the use and control of such moneys until deposits subsequently made by the defendant covered the shortage thus created.

4. SAME.

A man may overdraw his account in a bank and be innocent of any evil or unlawful purpose. A bank may desire to accommodate temporarily a depositor; and, if a depositor knowingly makes an overdraft, his relations with the bank or its officials may be of such a character as to prevent the taint of criminality from attaching to the transaction. But no man who is without a balance to his credit, or who has only an insufficient balance, has a right to draw checks for considerable amounts without the knowledge or consent of the proper officials, and with a fraudulent intent that the moneys of the bank in which he has no funds or not sufficient funds to his credit, shall be applied to the payment of those checks.

5. SAME—PROOFS OF FRAUD.

Fraud, being essentially a matter of motive or intention, is often deducible only from a great variety of circumstances, no one of which is absolutely decisive; but which in combination with each other may become persuasive as to the true nature and character of the transactions in controversy, and in cases in which the existence of fraud is in issue evidence of other acts and doings of the defendant of a kindred character are admissible in order to illustrate or establish the intent or motive in doing the particular act or acts directly in question.

6. CRIMINAL LAW—WEIGHT AND EFFECT OF EVIDENCE.

The verdict of the jury should not be controlled by contradictions on minor points, provided the evidence, taken as a whole, after making all due allowance for any such contradictions, leads to a fixed conclusion of the guilt of the defendant. Criminal cases involving much testimony and many facts should not be decided upon the probability or improbability of any one point singled out of the evidence; but a proper decision requires due consideration to be given to all the evidence, direct and circumstantial, in the case.

7. SAME—TESTIMONY OF DEFENDANT—WEIGHT AND CREDIBILITY.

The deep personal interest which a defendant in a criminal case has in its result should be considered by the jury in weighing his evidence, and in determining how far, if at all, it is worthy of credit. In considering the credibility of or weight which should be given to the testimony of the defendant in this case, the jury should regard, among other things, the inherent probability or improbability of his statements, his intelligence or want of intelligence, his opportunities for knowledge of business methods, and to what extent, if any, he has been corroborated by other evidence in the case.

8. SAME—PRESUMPTION OF INNOCENCE.

The presumption of innocence is evidence in favor of the defendant in a criminal case and stands as his sufficient protection unless it has been overcome and removed by the evidence in the case, taken as a whole, proving his guilt beyond a reasonable doubt.

9. SAME—DEFENDANT'S REPUTATION FOR HONESTY AND INTEGRITY.

While the circumstances in one case may be such as to require a verdict of guilty, notwithstanding an established reputation for honesty and integrity on the part of the defendant, in another case they may be such that an established reputation for honesty and integrity on the part of the defendant would create a reasonable doubt as to his guilt and require an acquittal, although aside from such reputation the evidence in the case would be convincing and justify a verdict of guilty.

10. SAME—DELIBERATIONS OF JURY.

If a large majority of the jurors differ in their conclusions with the minority, it is proper for those composing such minority, in view of the fact of such difference, to review the grounds of their own conclusions in order that, if possible, unanimity may be reached in accordance with

the principles of law laid down by the court. But no juror should acquiesce against his individual judgment in the conclusions reached by other jurors, whether constituting a majority or a minority of the jury; as the verdict must represent the real opinion and judgment of each member of the jury.

(Syllabus by the Court.)

This was an indictment against Richard R. Kenney for violating the national banking laws.

Lewis C. Vandegriff, U. S. Atty.

George Gray and Levi C. Bird, for defendant.

BRADFORD, District Judge (charging jury). The indictment, as it now stands, charges the defendant, Richard R. Kenney, with violating section 5209 of the Revised Statutes of the United States. That section is as follows:

"Sec. 5209. Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor," &c.

The words "any association," as used in section 5209 above quoted, relate to any national banking association organized under the laws of the United States. The First National Bank of Dover, in this District, is admitted to be, and to have been at the time of the alleged commission by the defendant of the offenses specified in the indictment, such an association. The indictment against the defendant as returned by the grand jury originally contained twenty-five counts, numbered serially. A number of the counts have been either disposed of on demurrer or abandoned by the District Attorney, and are not for your consideration. The counts remaining for your consideration are counts numbered ten, eleven, twelve, thirteen, seventeen, and eighteen. You will bear in mind the numbers of the counts just mentioned which are for your consideration in order to avoid confusing any of them with other counts originally contained in the indictment. I repeat, to aid your recollection, and prevent any misunderstanding on your part, that the counts which remain open for your consideration are counts numbered ten, eleven, twelve, thirteen, seventeen and eighteen. These counts are before you in connection with the evidence applicable to them, and embrace all the issues which are for your determination. The counts numbered ten, eleven, twelve and thirteen, charge in substance that the defendant did, with intent to injure and defraud The First National Bank of Dover, wilfully, unlawfully and fraudulently aid and abet William N. Boggs, who was the teller, wilfully, unlawfully and fraudulently to misapply the mon-

neys of that bank for the use, benefit and advantage of the said William N. Boggs, he, William N. Boggs, having the intent through such misapplication to injure and defraud the bank. The remaining counts, namely, counts numbered seventeen and eighteen, charge in substance that the defendant did, with intent to injure and defraud The First National Bank of Dover, wilfully, unlawfully and fraudulently aid and abet William N. Boggs, who was the teller, wilfully, unlawfully and fraudulently to misapply the moneys of that bank for the use, benefit and advantage of the defendant, he, William N. Boggs, having the intent through such misapplication to injure and defraud the bank. In order to warrant a conviction of the defendant under all or any of the counts numbered ten, eleven, twelve and thirteen, all of the essential ingredients of the offense as charged therein, must have been established to your satisfaction beyond a reasonable doubt. Under these counts it is necessary, in order to find a verdict of guilty, that you shall be satisfied that William N. Boggs, who was teller, wilfully, unlawfully and fraudulently misapplied, as therein charged, moneys of The First National Bank of Dover, for the use, benefit and advantage of the said William N. Boggs, and with intent on the part of William N. Boggs to injure or defraud the bank; and further, that the defendant, with like intent to injure or defraud the bank, wilfully, unlawfully and fraudulently aided or abetted William N. Boggs, as such teller, in effecting such wilful misapplication. In order to warrant a conviction of the defendant under either count numbered seventeen or count numbered eighteen, all of the essential ingredients of the offense as charged therein must have been established to your satisfaction. Under these counts it is necessary, in order to find a verdict of guilty, that you shall be satisfied that William N. Boggs, who was teller, wilfully, unlawfully and fraudulently misapplied as therein charged, moneys of The First National Bank of Dover, for the use, benefit and advantage of the defendant, with intent on the part of William N. Boggs to injure or defraud the bank; and further, that the defendant with like intent to injure or defraud the bank, wilfully, unlawfully and fraudulently aided or abetted William N. Boggs in effecting such wilful misapplication. There is uncontradicted evidence, and it is admitted by the counsel for the defendant, that William N. Boggs, at the time of his flight from Dover on May 29, 1897, was a defaulter to the amount of \$107,000, and that that sum represented moneys of The First National Bank of Dover which he had as receiving and paying teller of that bank unlawfully embezzled, abstracted and misapplied, in violation of section 5209 of the Revised Statutes of the United States. It also appears from uncontradicted testimony in the case that within a few days after the flight of William N. Boggs, his defalcation was discovered by the officers of the bank, and upon subsequent investigation ascertained to amount to the above mentioned sum. Irving D. Boggs, who was bookkeeper of the bank, testified to the effect that its individual ledger contained entries showing balances due from time to time to the defendant as one of its depositors, and also overdrafts by the defendant from time to time as a depositor; and further that he, Irving D. Boggs, had no knowledge of the alleged fraudulent checks drawn by the defendant upon

the bank, until after the flight of William N. Boggs. Irving D. Boggs further testified that whenever he received a deposit from any depositor of the bank he did contemporaneously and truly enter in his own handwriting the amount thereof in the individual ledger to the credit of the depositor; and further that when William N. Boggs, as teller, reported to him, Irving D. Boggs, the amount of any deposit which he, William N. Boggs, had received, he, Irving D. Boggs, would in like manner enter the amount thereof in the individual ledger to the credit of the person so reported by William N. Boggs to have made such deposit; and further that the usual though not invariable course was for him, Irving D. Boggs, to correctly make entries in the individual ledger directly from an inspection by him of the deposit slips. William N. Boggs testified to the effect that whenever any deposit was made by or on account of the defendant, he either correctly reported that amount to Irving D. Boggs, the bookkeeper, for entry in the individual ledger to the credit of the defendant, or in case of the absence of Irving D. Boggs, truly and accurately made such entry in the individual ledger himself; and further, that with the exception of four deposits specified by him, such entries were made in the individual ledger contemporaneously with the deposits. The four deposits which were not entered in the individual ledger contemporaneously with their receipt, were as follows, as testified to by William N. Boggs. On June 20, 1896, there was a deposit of \$100, which was not credited to the defendant in his account in the individual ledger until three days thereafter. On July 23, 1896, there was a deposit of \$1386.50, which was not credited to the defendant in his account in the individual ledger until two days thereafter. On December 7, 1896, there was a deposit of \$188.85, which was not credited to the defendant in his account in the individual ledger until four days thereafter. And on February 2, 1897, there was a deposit of \$725, which was not credited to the defendant in his account in the individual ledger until three days thereafter. T. Edward Ross, the expert accountant, testified to the effect that the balances as shown in the deposit book of the defendant whenever the deposit book was settled agreed with the balances as shown in the individual ledger, and that the deposits agreed except in four instances; which correspond exactly with the four deposits withheld as testified to by William N. Boggs. It appears from the testimony of William N. Boggs and Irving D. Boggs that not taking into consideration checks alleged to have been fraudulently drawn by the defendant upon the bank, the entries in the individual ledger relating to the defendant's account were so carried on as to accurately show, with the exception of the four deposits just mentioned, the true condition of his account as a depositor at all times within the period above mentioned. These entries are before you, not as independent evidence of themselves, but as proper for your consideration in connection with the testimony of William N. Boggs and Irving D. Boggs, as tending, in connection with that testimony, to show the amounts of the balances whether due from the defendant to the bank or from the bank to the defendant, aside from the alleged fraudulent check transactions of the defendant.

Before adverting to the evidence in the case I shall now bring to

your attention some elementary principles of law necessary for your guidance in determining upon your verdict. The law presumes persons charged with crime are innocent until they are proved by competent evidence to be guilty. This presumption is evidence in favor of the defendant and stands as his sufficient protection unless it has been overcome and removed by the evidence in the case taken as a whole, proving his guilt beyond a reasonable doubt. To justify a verdict of guilty the evidence adduced in the case as a whole must be such as to exclude every reasonable hypothesis but that of the guilt of the defendant as charged in one or more of the counts in the indictment remaining open for your consideration; and from this it, of course, follows, that if the jury find that all the evidence in the case, when taken together, is as compatible with the theory of innocence as with the theory of guilt, there should be an acquittal. The commission of a criminal offense can be proved by circumstantial evidence as well as by direct evidence, provided the circumstances proved, together with all reasonable inferences drawn from them, are such as to leave no reasonable doubt in the minds of the jury that the defendant is guilty. You are to take into consideration all the evidence in this case, both direct and circumstantial, together with all reasonable inferences to be drawn from that evidence, in arriving at a conclusion. A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. It is not a whimsical, arbitrary or purely speculative doubt; nor a mere conjecture or guess. If after an impartial comparison and consideration of all the evidence you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence you can truthfully say that you have a fixed conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs; you have no reasonable doubt, and in that case should find a verdict of guilty. Absolute certainty is not required for such a verdict. Proof beyond a reasonable doubt as above defined is sufficient. A number of reputable witnesses have testified that for many years last past the reputation of the defendant for honesty and integrity in the community in which he has resided during that period has been good. This testimony is evidence in favor of the defendant and is before you for your consideration in connection with the other evidence in the case. In all cases in which a person accused of a crime, involving dishonesty and want of integrity, is on trial, his good reputation for honesty and integrity or, as it is sometimes called, his good character for honesty and integrity, is properly to be submitted to the jury. The purpose of such testimony is to enable the jury to determine the degree of improbability that the person on trial, who possesses such a reputation, should have committed such a crime. What weight is to be given to the good reputation of the defendant rests solely with the jury. The circumstances in one case may be such that an established reputation for honesty and integrity on the part of the defendant would create a reasonable doubt as to his guilt, although

without such reputation the evidence in the case would be convincing and justify a verdict of guilty. In another case the circumstances may be such as would require a verdict of guilty notwithstanding an established reputation for honesty and integrity on the part of the defendant. It does not necessarily follow from the fact that a man has a good reputation for honesty and integrity that he actually possesses those traits of character. The mere possession of such a reputation does not render the person possessing it incapable of committing a crime involving dishonesty and a want of integrity. It is within the common knowledge of mankind that many persons bearing a good reputation have nevertheless been guilty of crime. While the reputation of the defendant for honesty and integrity is for your consideration as part of the evidence in the case, it is entitled to just the weight,—no less and no more,—which you, upon a review of all the evidence in the case and in the exercise of a sound judgment shall attach to it. While the court brings to your attention some of the evidence on both sides, you are instructed that you are not in the least to be controlled by anything which has been or shall be stated by the court in relation to the evidence in this case, and are to exercise your own independent judgment in relation to the same. While it is my duty to call your attention to such portions of the evidence as in the judgment of the court may aid you in arriving at a just verdict, you are to give to the testimony only such weight and effect as you consider it entitled to. The alleged fraudulent checks set forth in the indictment as it now stands it is admitted were all drawn by the defendant on The First National Bank of Dover, and are as follows: A check drawn September 21, 1896, for \$300, in favor of William Anderson; a check drawn September 30, 1896, for \$250, in favor of William Anderson; a check drawn October 16, 1896, for \$275, in favor of William Anderson; a check drawn October 22, 1896, for \$230, in favor of William Anderson; a check drawn November 27, 1896, for \$200, in favor of William Anderson; a check drawn May 6, 1896, for \$1650, in favor of Samuel L. Shaw, Sheriff; a check drawn September 23, 1896, for \$900, in favor of E. B. Cuthbert & Co.; a check drawn May 8, 1896, for \$250, in favor of E. B. Cuthbert & Co.; a check drawn May 12, 1896, for \$250, in favor of E. B. Cuthbert & Co.; a check drawn June 2, 1896, for \$300, in favor of E. B. Cuthbert & Co.; another check drawn June 2, 1896, for \$200, in favor of E. B. Cuthbert & Co.; a check drawn June 4, 1896, for \$500, in favor of E. B. Cuthbert & Co.; a check drawn June 13, 1896, for \$500, in favor of E. B. Cuthbert & Co.; a check drawn June 29, 1896, for \$500, in favor of E. B. Cuthbert & Co.; and a check drawn July 2, 1896, for \$1000, in favor of E. B. Cuthbert & Co. There is evidence in the case, oral and documentary, including the testimony of T. Edward Ross, the expert accountant, based upon a comparison of the books of The Farmers' Bank at Dover, and The Union National Bank at Wilmington, with the individual ledger of The First National Bank of Dover, tending to show that, at the times the checks set forth in the indictment as it now stands, respectively were drawn by the defendant and paid out of the funds

of The First National Bank of Dover, the account of the defendant was either overdrawn, and sometimes overdrawn to a large amount, or that the defendant had not sufficient moneys to his credit in his account in that bank to meet these checks. I shall not weary you with a recital of all the details involved in this subject, as the matter has been so recently and fully presented to you in the evidence and in the arguments of counsel. The court has allowed the introduction of evidence respecting a number of checks, other than those set forth in the indictment, alleged to have been drawn by the defendant upon The First National Bank of Dover, for various sums, when the defendant's account was either overdrawn or did not contain sufficient balances in favor of the defendant to pay the checks so drawn, and which checks were paid out of the funds of that bank, not being charged to the defendant at the time of such payment, according to the testimony. The introduction of this evidence was allowed as tending to show the intent or motive of the defendant in drawing and securing the payment out of the funds of The First National Bank of Dover of such checks. The reason for the introduction of the evidence respecting checks not set forth in the indictment is found in the fact that fraud, being essentially a matter of motive or intention, is often deducible only from a great variety of circumstances, no one of which is absolutely decisive; but which in combination with each other may become persuasive as to the true nature and character of the transactions in controversy. And in cases in which the existence of fraud is in issue evidence of other acts and doings of the defendant of a kindred character are admissible in order to illustrate or establish his intent or motive in doing the particular act or acts directly in question. You are, however, instructed that you cannot find a verdict of guilty against this defendant on account of any transaction connected with any check not set forth in the indictment as it now stands. There is evidence, and it has not been controverted, that the five above mentioned checks drawn by the defendant on The First National Bank of Dover, in favor of William Anderson, were for the benefit and advantage of William N. Boggs, and there is further evidence that all of those five checks were paid out of the funds of The First National Bank of Dover, but were never charged to the account of the defendant in the books of that bank, and that the amounts so paid out of the funds of that bank on those checks were wholly lost to the bank. There is evidence, and it has not been controverted, that the above mentioned check for \$1650, drawn by the defendant on The First National Bank of Dover, in favor of Samuel L. Shaw, Sheriff, was used in connection with the purchase at sheriff's sale of a certain farm which was bought by or on account of William N. Boggs; and there is evidence that this check for \$1650 was paid out of the funds of The First National Bank of Dover, but was never charged to the account of the defendant on the books of that bank, and that the amount so paid out of the funds of that bank on this check was wholly lost to the bank. There is evidence, and it has not been controverted, that the above mentioned check for \$900, drawn by the defendant on The First

National Bank of Dover, in favor of E. B. Cuthbert & Co., was used in connection with certain stock speculations carried on either by William N. Boggs or Ezekiel T. Cooper with E. B. Cuthbert & Co. The evidence is conflicting on the point whether this check was intended for the benefit and advantage of William N. Boggs, on the one hand, or of Ezekiel T. Cooper, on the other. The question presented by this conflict of evidence is for your consideration and solution. There is evidence that this check for \$900 was paid out of the funds of The First National Bank of Dover, but was never charged to the account of the defendant on the books of that bank, and that the amount so paid out of the funds of that bank on this check was wholly lost to the bank. There is evidence, and it has not been controverted, that the eight above mentioned checks, not including the check of \$900 just referred to, drawn by the defendant on The First National Bank of Dover, in favor of E. B. Cuthbert & Co., were for the benefit and advantage of the defendant, and there is further evidence that those eight checks were paid out of the funds of The First National Bank of Dover, but were not charged to the account of the defendant on the books of that bank concurrently with their payment, but, on the contrary, were withheld from the account of the defendant for varying periods of time after they were so paid; those periods ranging from three days to several months. An average of those varying periods testified to amounts to about thirty two days. While the respective amounts of the eight checks last referred to were, at the expiration of those respective periods, paid by the defendant to The First National Bank of Dover, that bank was deprived of the use and control during those respective periods of its funds to the amount of the checks respectively withheld during those periods. This constituted a loss and injury to the bank. Of course, if you should believe from the evidence that the defendant in giving checks mentioned in the indictment as it now stands, at the request and for the use, benefit and advantage of William N. Boggs, honestly believed that William N. Boggs had ample means of his own to pay the same, and that the same were being paid by William N. Boggs out of his own money, and not out of the moneys, funds and credits of The First National Bank of Dover, you could not convict the defendant with respect to those check transactions. The main question in the case is whether or not the defendant, with intent to injure and defraud The First National Bank of Dover, wilfully, unlawfully and fraudulently aided or abetted William N. Boggs, as teller, wilfully and unlawfully to misapply the moneys of that bank for the use, benefit and advantage of the defendant or of William N. Boggs, as respectively charged in the indictment as it now stands; he, William N. Boggs, having in making such misapplication a like intent, and the defendant knowing that William N. Boggs was teller. You must be satisfied, in order to find a verdict of guilty, that the defendant had knowledge of the intention of William N. Boggs so to misapply the moneys of The First National Bank of Dover, and that the defendant did some act or acts for the purpose of aiding or abetting William N. Boggs in making such misapplication. If the

other ingredients of the crime existed, the aiding or abetting could be accomplished through the instrumentality of a check or checks drawn upon The First National Bank of Dover, which either caused or facilitated the prohibited misapplication of its funds. Under the counts of the indictment as it now stands, all of which charge the defendant with aiding or abetting William N. Boggs wilfully, unlawfully and fraudulently to misapply the moneys of The First National Bank of Dover, the drawing of a fraudulent check by the defendant and his procuring it to be paid by William N. Boggs, as teller, out of the funds of the bank in manner as alleged in the indictment, constitutes the act of aiding or abetting within the meaning of the law. Much has been said on the subject of overdrafts, and the circumstances under which they are or are not criminal under section 5209 of the United States Revised Statutes. A man may overdraw his account in a bank and be innocent of any evil or unlawful purpose. Overdrafts are not uncommon in bank transactions. A bank may desire to accommodate temporarily a depositor, and if a depositor knowingly makes an overdraft his relations with the bank or its officials may be of such a character as to prevent the taint of criminality from attaching to the transaction. But no man who is without a balance to his credit in a bank or who has only an insufficient balance, has a right to draw checks for considerable amounts without the knowledge or consent of the proper officials and with a fraudulent intent that the moneys of the bank in which he has no funds or not sufficient funds to his credit shall be applied to the payment of those checks. The defendant cannot be convicted unless he had the wrongful or illegal intent to injure or defraud the bank in drawing the alleged fraudulent checks or some one or more of them set forth in the indictment as it now stands. Whether or not he had that intent is to be determined by the facts and circumstances and the surroundings at the time he drew those checks. If he knew or had good reason to believe when he drew the checks set forth in the indictment as it now stands that they or any of them were to be fraudulently paid by William N. Boggs, the teller, out of the funds of the bank, and not out of any funds to which he, the defendant, could legitimately resort, he had the guilty intent. And although it may have been the intent of the defendant at the time he drew the alleged fraudulent checks to finally recompense or remedy the injury resulting from his act to The First National Bank of Dover, such an intent to correct the wrong does not absolve him from guilt. Nor would the fact, if fact it be, that he hoped through successful operations in stocks or other property, or otherwise, to be placed in a position to restore to the bank moneys wilfully misapplied through his wrongful act be any answer to the charge of criminality. No man is permitted to aid or abet the wilful misapplication of the funds of a national bank because he hopes in the future to repair his wrong.

So if you are satisfied that there was a fraudulent scheme, understanding or agreement between the defendant and William N. Boggs that the eight checks drawn by the defendant on The First

National Bank of Dover, in favor of E. B. Cuthbert & Co. for the benefit and advantage of the defendant, were to be paid by William N. Boggs, as teller, out of the funds of that bank, when he, the defendant, had either no funds or only insufficient funds or was overdrawn in his account and that such checks were not to be charged in the defendant's account, but were to be fraudulently concealed from the proper bank officials until he should make deposits sufficient to meet them, the defendant had a guilty intent to injure or defraud the bank. For such scheme, understanding or agreement, if it existed and was carried out, as testified to, involved a fraudulent and wilful misapplication of the moneys of the bank to the amount of such checks, and wrongfully and unlawfully deprived the bank of the use and control of such moneys until deposits subsequently made by the defendant, as testified to, covered the shortage thus created. An intent to injure or defraud a national bank within the meaning of section 5209 of the United States Revised Statutes does not necessarily involve malice or ill-will toward the bank. There are few, if any, cases in which the funds of a bank are embezzled, abstracted or wilfully misapplied merely for the purpose of injuring the bank. Such funds are embezzled, abstracted or wilfully misapplied for personal gain. But the law presumes that every sane person who has attained the age of discretion contemplates and intends the necessary or natural consequences of his own acts. It is sufficient that the unlawful intent is such that, if carried into execution, it will necessarily or naturally injure or defraud the bank. It is wholly immaterial in this case whether the money alleged to have been taken from the funds of The First National Bank of Dover and applied to the payment of the alleged fraudulent checks, or any of them, set forth in the indictment as it now stands, was so taken for the sole use, benefit and advantage of the defendant or for the use, benefit and advantage of the defendant with others; and it is also wholly immaterial whether the money alleged to have been taken from the funds of that bank and applied to the payment of the alleged fraudulent checks for the use, benefit and advantage of William N. Boggs, was so taken for the sole use, benefit and advantage of William N. Boggs or for the use, benefit and advantage of William N. Boggs with others. It is also wholly immaterial so far as the guilt or innocence of this defendant is concerned, whether the alleged fraudulent checks of the defendant set forth in the indictment as it now stands, were intended for the use, benefit and advantage of himself, on the one hand, or for the use, benefit and advantage of William N. Boggs, on the other, provided, the evidence in the case supports the allegations in the different counts of the indictment as it now stands, or some one or more of them.

William N. Boggs has pleaded guilty to the charge of unlawfully embezzling, abstracting and misapplying the moneys, funds and credits of The First National Bank of Dover, and in this case he has testified in the character of an accomplice. While the testimony of an accomplice should always be received with caution and weighed and scrutinized with great care by the jury, the accomplice

is nevertheless a competent witness, and the degree of credit which should be given to the testimony of an accomplice is a matter exclusively within the province of the jury. While the jury as a matter of law may convict a person accused of a grave crime upon the uncorroborated testimony of an accomplice, it is, however, usual for the court to advise the jury against a conviction unless the testimony of the accomplice has been corroborated by competent evidence in some material part or parts. The corroboration need not extend to all matters testified to by the accomplice, but it being shown that the accomplice has testified truly in some particulars, it may be inferred by the jury that he has in others. In this case you are to determine upon the evidence whether William N. Boggs has or has not been corroborated with respect to material parts of his testimony by the documentary evidence and the testimony of other witnesses; and you are also to determine whether or not William N. Boggs has been successfully contradicted, if at all, with respect to any material portion of his testimony. It is also true, gentlemen, that while the court is careful to remind you that the credit of William N. Boggs is entirely for your consideration, it would be very far from your duty if, disregarding what may seem to you natural and inherently truthful testimony given by him, you should permit yourselves to be carried away by fierce denunciations, by heated language, and by excited and unwarranted epithets applied to him. On the contrary with measured and impartial deliberation, like men who have a large interest at stake, you should carefully, anxiously and judicially scan and weigh the evidence of William N. Boggs. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this right. His testimony is before you and you must determine how far it is credible. The deep personal interest which he has in the result of this case should be considered by you in weighing his evidence, and in determining how far, or to what extent, if at all, it is worthy of credit. In considering the credibility of or weight which you should give to the testimony of the defendant, you should regard, among other things, the inherent probability or improbability of his statements, his intelligence or want of intelligence, his opportunities for knowledge of business methods, and to what extent, if any, he has been corroborated by other evidence in the case. You should especially look to the interest any witness who has testified before you in this case has in its result. Where a witness has a direct personal interest in the result of a case the temptation is strong to color, pervert or withhold the facts.

William N. Boggs testified, among other things, to the effect that his defalcation at The First National Bank of Dover, first became known to the defendant in the early part of October, 1895; that at that time his defalcation was from \$20,000 to \$30,000; that he told the defendant, as his counsel, at that time the state of affairs as nearly as he could and the defendant advised him in relation to certain matters connected with them; that he, William N. Boggs, was greatly encouraged by the interview he had with the defendant at that time; that the defendant inquired at that time what

assets he had that could be utilized or what means to resort to for the payment of the defalcation; and that the defendant undertook to collect certain claims that he, William N. Boggs had against Thomas S. Clark. William N. Boggs further testified that from the time of his consultation with the defendant in October, 1895, up to and including 1896, he had many conversations with the defendant in relation to his defalcation; that the defendant knew that his defalcation continued during all that time; that the defendant would ask him how he was getting along; that at the time of his consultation with the defendant in October, 1895, the defendant asked him how he had concealed his defalcation from the examiner and from the officials of the bank; that the special thing that he, William N. Boggs, feared at that time was an examination which he thought was to be made on the following day, and that the defendant said to him, William N. Boggs, "You have concealed it before, I don't see why you cannot do it again," or words to that effect; that he carried the Cuthbert and other checks for the defendant because they were in a hole together; that "Mr. Kenney knew that I was in a hole and I knew Mr. Kenney was in a hole, and he was doing what he could, as I thought, to help me, and I was doing what I could, as I thought, to help him;" that he held out the defendant's checks without the knowledge or consent of the bank or its officers and with the knowledge and consent of the defendant, the defendant knowing at the time that he, William N. Boggs, was in default to the bank; that he, William N. Boggs, when the defendant gave the Shaw check, the Anderson checks and the \$900 Cuthbert check, told the defendant that they would not be charged to his account, the defendant knowing at the time that he, William N. Boggs was in default to the bank; that he, William N. Boggs, had an arrangement with the defendant for the payment of the defendant's checks out of the funds of the bank, and that he paid every check of the defendant out of such funds whether the defendant's account was or was not good for it; that the real reason why he, William N. Boggs, went to the defendant and borrowed any of his checks was because, "I was very intimate with him, was as intimate as anyone else, and that he knew as much about my affairs as anyone, and that the favors that I was extending to him I considered equal or greater than the ones that I was asking of him;" that the plan of him, William N. Boggs, in balancing the defendant's deposit book was that it should always be balanced so as to show "as near even as possible on the ledger," thus creating no suspicion, showing either a small balance or a small overdraft, and that in balancing the defendant's book, if at the time he, William N. Boggs was holding out any of the defendant's checks, he would call the defendant's attention to those, so that he could see whether they were being carried on the bank's ledger, and that "what we were carrying on the bank's ledger with the checks that I was holding out did correspond with the balance, if he correctly kept it, of his own account;" and that any checks that were held out at the time of the settlement of the deposit book would not show upon the books of the bank, those checks being the same to

which he, William N. Boggs called the attention of the defendant on several occasions.

The defendant testified, among other things, to the effect that he had known William N. Boggs since about 1881; that William N. Boggs was a very much younger man than the defendant; that the defendant became counsel for William N. Boggs in 1892 or 1893; that up to that time the defendant's relation with William N. Boggs had not been intimate, and that the defendant never had any social intimacy at all with William N. Boggs; that the defendant first learned of the defalcation of William N. Boggs to The First National Bank of Dover in November, 1894, soon after the general election; that at that time William N. Boggs came to the defendant's house at night and told the defendant that he, William N. Boggs, was in trouble with the bank; that the defendant was surprised and horrified to hear it; that William N. Boggs came to the defendant as his counsel for advice as to what he, William N. Boggs, should do; that the defendant told William N. Boggs, "you have friends and relations enough who can fix this matter up before it becomes public;" that William N. Boggs did not inform the defendant of the amount of his defalcation or of the way in which it occurred, nor did the defendant ask him about the amount of the shortage, either then or at any other time; that this interview did not last ten minutes, and William N. Boggs at its conclusion left the defendant's house seeming to be very much relieved; that at no time after this interview did William N. Boggs make any reference to the defalcation to the defendant until about a week before his flight from Dover, which occurred May 29, 1897; that the defendant was positive that the interview occurred in November, 1894; that in the fall of 1895 William N. Boggs spoke to the defendant about his trouble with the directors of the bank because of his playing cards; that William N. Boggs told the defendant that he had satisfied the directors that he would quit playing cards, and that he had seen Mr. Massey in Philadelphia, one of his bondsmen, upon the subject, and Mr. Massey told him, William N. Boggs, that he would forgive him for playing cards and gambling if he were all right in his accounts with the bank; that William N. Boggs told the defendant that he had satisfied Mr. Massey; that the defendant had every reason to believe that William N. Boggs was square with the bank, and that he was apparently in funds during 1895 and 1896; that from the last of 1895 to October, 1896, William N. Boggs had, exclusive of his salary as teller and his notarial fees, cash or other property amounting in the aggregate to \$4282.13, and William N. Boggs frequently told the defendant that he, William N. Boggs, was making a large amount of money in speculating and gambling operations; that the defendant had no knowledge whatsoever of the holding out of his checks upon the bank as set forth in the indictment; that he knew at various times during the period covered by the alleged fraudulent checks that he had overdrawn his account in the bank and had been called upon by the officers of the bank to make certain checks good; that he had no idea of the condition of his account as testified to on the part of the government;

that he relied entirely upon the bank to keep his account; or "upon Mr. Boggs rather, who really was the only officer in the bank that I came in contact with in a business way; he always took charge of the matters generally and whenever it was necessary for me to make a deposit or to cover my account he always notified me, and I never failed in my life when notified that I was overdrawn or had a check and my funds were not sufficient to pay it that I did not promptly get the money and make it good. And this condition running over that period of time as shown here by this examination was then and up to the time that they testified on the stand as new to me as to you;" that the defendant had no doubt but that his deposits were just about keeping up with his checks justifying the balances struck every two or three months showing that he either had a small balance or a very insignificant overdraft; and that the defendant when his account became overdrawn was notified to make it good by William N. Boggs or some other officer of the bank. The defendant in his testimony further denies in effect any fraud on his part in connection with any of the checks set forth in the indictment as it now stands. I have thus presented to you what seem to the court to be the more material portions of the defendant's testimony. Is that testimony probable or improbable, when taken by itself, or in connection with the other evidence, oral and documentary, in the case. The defendant has been a member of the bar since October 21, 1881, and has been actively engaged in the practice of his profession. Before the alleged fraudulent checks were given he knew, upon his own showing, that William N. Boggs was teller of The First National Bank of Dover, and that as such teller he had been guilty of a defalcation to that bank. William N. Boggs testified that early in October, 1895, he consulted for the first time the defendant as his counsel with respect to that defalcation. The defendant admits that William N. Boggs consulted him with respect to the defalcation, but states positively that the consultation occurred in November, 1894, after the general election. The discrepancy as to the date between William N. Boggs and the defendant may not be material, but it may be observed in passing that the defendant, in his interview with Thomas J. Ewell, reporter for the Baltimore Sun, stated that the consultation occurred "in November, 1893 or 1894, I am uncertain as to the date." The defendant testified to the effect that at this consultation he was surprised and horrified at the announcement by William N. Boggs of his defalcation, but that he never inquired as to its amount or the manner in which it occurred, but merely advised William N. Boggs to see his friends and relations with a view of making good the defalcation. William N. Boggs, on the contrary, testified to the effect, that he made upon that occasion a full disclosure of the amount of the defalcation. In view of the character of the consultation, it is for you to determine which of them is to be believed in this regard. The defendant testified in effect that when he made overdrafts in his account at The First National Bank of Dover he was notified from time to time to make his account good either by William N. Boggs or some other officer of the bank. Both Harry

A. Richardson, the president, and John H. Bateman, the cashier of the bank, testified to the effect that they had been in entire ignorance of the holding out of checks drawn by the defendant upon that bank, as charged in the indictment, until after the discovery of the defalcation in June, 1897. If Mr. Richardson and Mr. Bateman are to be believed, it would seem to be evident any notification which may have been sent by either of them to the defendant to make good any overdraft in his account could have had relation to nothing else than the overdrafts as shown in red ink on the individual ledger. In fact the defendant has not testified that his overdrafts of which he received notification were other than those which were duly entered as such on the books of the bank. Mr. Richardson testified to the effect that the teller had no right to loan money of the bank or permit overdrafts or to carry any of the alleged fraudulent checks set forth in the indictment. Mr. Bateman testified to the same effect. The defendant testified to the effect that from the time William N. Boggs made known to him the defalcation in November, 1894, until about a week before his flight he, the defendant, never on any occasion had any communication, oral or otherwise, with William N. Boggs touching such defalcation, and he, the defendant, supposed that William N. Boggs had repaid to the bank the amount of his shortage. William N. Boggs, on the contrary, testified to the effect that there were numerous conversations between the defendant and himself during that period with respect to the defalcation. It appears that the defendant's office was next door to the bank; that the defendant continued during the whole of the above period counsel for William N. Boggs, and that he and William N. Boggs saw each other frequently. In view of these circumstances and of the shock with which the defendant, according to his testimony, received the intelligence in November, 1894, of the defalcation of William N. Boggs, which of the two is to be believed? You will, of course, gentlemen, in deciding on the evidence, such questions apply common intelligence and common sense in the light of human experience. William N. Boggs testified to the effect that he had an arrangement with the defendant for the payment of the defendant's checks out of the funds of the bank, and that he paid every check of the defendant out of such funds whether the defendant's account was or was not good for it. The defendant testified to the effect that he believed that William N. Boggs possessed ample means to cover all checks drawn by the defendant upon the bank for the use, benefit and advantage of William N. Boggs. A number of the alleged fraudulent checks set forth in the indictment as it now stands are admitted by the defendant to have been for the use, benefit and advantage of William N. Boggs. Why then should the defendant have drawn such checks upon the bank if you believe that he was either overdrawn or had not sufficient funds to meet such checks, instead of allowing William N. Boggs to apply his own funds, supposed by the defendant to be ample to accomplish the purpose for which the defendant gave his checks. It is admitted that William N. Boggs was a defaulter to the amount of \$107,000. The uncontradicted testimony shows that the defend-

ant was, prior to the giving of the alleged fraudulent checks set forth in the indictment, aware that William N. Boggs was a defaulter to the bank. The defendant knew that William N. Boggs was teller of the bank. He also knew, according to the testimony, that William N. Boggs was a gambler and a stock speculator on margins. While the defendant availed himself of his right to testify, he has not stated, nor has any other witness in the case testified, that the defendant did, at any time, make any inquiry of the officials of The First National Bank of Dover as to the fidelity and regularity of William N. Boggs as teller. Is there or not any explanation, and if so, what is it, of the association, if it has been proved, of the defendant with William N. Boggs in check transactions set forth in the indictment as it now stands, after the defendant had become aware that William N. Boggs had been a defaulter to The First National Bank of Dover? This is for your consideration. I do not deem it necessary to refer to the subject of corroboration either of William N. Boggs or of the defendant. There has been much documentary evidence as well as oral testimony upon that point which is fresh in your recollection. Testimony has been adduced for the purpose of contradicting William N. Boggs and the defendant. The effect of this testimony is for your determination alone. It has been so recently delivered that I do not feel called upon, in view of that circumstance, to comment upon it. It is proper that I should add that your verdict in this case should not be controlled by contradictions on minor points, should any such exist, provided the evidence, taken as a whole after making all due allowance for any such contradictions, leads you to a fixed conclusion of the guilt of the defendant. If the evidence so taken shall not satisfy you beyond a reasonable doubt, as already defined, that the defendant is guilty, he should be acquitted. If, however, the evidence does so satisfy you beyond a reasonable doubt your verdict should be guilty. A criminal case involving much testimony and many facts should not be decided upon the probability or improbability of any one point singled out of the evidence; but a proper decision requires due consideration to be given to all the evidence, direct and circumstantial, in the case. Gentlemen, I need hardly remind you that you are fully to understand that all intimations or expressions of opinion by the court upon the evidence in this case or deductions to be drawn from it, while intended to aid you in reaching proper conclusions, do not in the least control you in arriving at your verdict. You are the sole judges of the credibility of witnesses, the weight to be given to their testimony, and the weight and effect of the evidence, whether oral or documentary. While it is the exclusive function of the court to present to you the principles of law applicable to the case, it is your exclusive function to pass upon the facts and the evidence and reach a conclusion, subject to the principles of law as presented by the court. The court has been requested to give you instructions on a number of points of law in the language employed by the counsel in the case. The charge of the court embraces in substance all the propositions suggested by the counsel in so far as those proposi-

tions are, in the opinion of the court, properly applicable to the case.

Your verdict should represent the opinion of each member of your body, after an intelligent and conscientious comparison and consideration in the jury room of the views of the individual jurors. Your investigation of the evidence should be marked with due deliberation, and your minds should remain open to conviction by arguments which commend themselves to your judgment. The very object of the jury system is to secure unanimity through comparison of the views and through arguments among the jurors themselves. If a large majority of the jurors, after deliberation in the jury room, differ in their conclusions with the minority, it is proper for those composing such minority, in view of the fact of such difference, to review the grounds of their own conclusions in order that, if possible, unanimity may be reached in accordance with the principles of law heretofore laid down. But no juror should acquiesce against his individual judgment in the conclusions reached by other jurors, whether constituting a majority or a minority of your whole body. For your verdict must represent the real opinion and judgment of each member of the jury. The guilt or innocence of the defendant is to be determined by you as intelligent and conscientious men, upon the evidence adduced in this case and upon that alone. A grave and solemn responsibility rests upon you. No public clamor, no sentiment of hostility or sympathy, no consideration of consequences which may result from your verdict, should be permitted in any manner to influence your deliberations or control your verdict. If upon all the evidence in the case you are not satisfied beyond a reasonable doubt of the guilt of the defendant on one or more of the counts of the indictment remaining open for your consideration, you should acquit him; but if upon all the evidence in the case you are satisfied beyond a reasonable doubt that the defendant is guilty in manner and form as he stands indicted on some one or more of those counts, you should return a verdict of guilty. If you so find a verdict of guilty it may be a general verdict of guilty or a verdict of guilty as to all or any of such counts now remaining in the indictment, as the evidence shall warrant.

The jury, after a deliberation of seventy-two hours, were unable to agree, and were discharged by the court.

JOHN J. KELLER & CO. v. UNITED STATES.
(Circuit Court, S. D. New York. January 4, 1896.)
No. 1,200.

CUSTOMS DUTIES—CLASSIFICATION—EXTRACT OF LOGWOOD.

Extract of logwood, mordanted with a salt of chromium, for printing colors on cotton fabrics,—the mixture being mechanical, and not chemical,—was dutiable under the description "extracts and decoctions of logwood," "such as are commonly used for dyeing," contained in paragraph 26 of the act of 1890, and not as a chemical compound, under paragraph 76.

This was an application by John J. Keller & Co. for a review of a decision of the board of general appraisers affirming the action of the collector of the port of New York in the classification for duty of certain imported merchandise.

Albert Comstock, for plaintiff.

James T. Van Rensselaer, Asst. U. S. Atty.

WHEELER, District Judge. This importation seems to be an extract of logwood, mordanted with a salt of chromium, for printing colors on cotton fabrics. It was assessed for duty as a chemical compound, under paragraph 76 of the tariff act of 1890. The testimony taken since shows it to be a mechanical mixture of the extract and salt, and not a chemical compound. As such, it does not come within the description of anything mentioned in paragraph 76. The protest refers to paragraph 26, which lays a lesser duty on "extracts and decoctions of logwood, and other dye-woods * * * such as are commonly used for dyeing, or tanning." This printing of colors upon cotton fabrics is an extension or branch of the art of dyeing; and this extract of logwood, so prepared with a mordant, which is necessary for fixing the colors, is commonly used in that branch of the art, "for dyeing." So, as this case now appears, the assessment should have been made under paragraph 26. Judgment reversed.

WM. J. MATHESON & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. May 14, 1895.)

No. 929.

CUSTOMS DUTIES—CLASSIFICATION—COAL-TAR PREPARATIONS.

Oil of mirbane, or nitrobenzole, which is in fact a preparation of coal tar, and is not known commercially as an essential oil, was dutiable as a coal-tar preparation, under paragraph 19 of the act of 1890, and not as an essential oil or chemical compound, under paragraph 76.

This was an application by W. J. Matheson & Co. for a review of a decision by the board of general appraisers affirming the action of the collector of the port of New York in respect to the classification for duty of certain imported merchandise.

Albert Comstock, for importers.

James T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The article in question is oil of mirbane, or nitrobenzole. The board of general appraisers classified it for duty, under paragraph 76 of the act of 1890, at 25 per cent., as a product known as an essential oil, or as a chemical compound. The importers claim that the article should be classified at 20 per cent., under paragraph 19 of said act, as a coal-tar preparation, not a color or dye. The evidence shows that this is a coal-tar preparation in fact, and not a color or dye. It further appeared from the evidence that it is not generally known commercially as an essen-

tial oil. In view of these facts, the decision of the board of general appraisers is reversed, and the article should be classified for duty under paragraph 19 of said act.

WM. J. MATHESON & CO., Limited, v. UNITED STATES.

(Circuit Court, S. D. New York. March 23, 1896.)

No. 1,201.

1. CUSTOMS DUTIES—CLASSIFICATION.

An article not commercially known in this country at the time of the passage of a tariff law, but subsequently imported, and which in fact comes within the proper definition of a similar article then known and provided for in the act, and which is so designated commercially, is entitled to be classified as such.

2. SAME—ALIZARINE BLACK.

The article imported since 1891, and commercially known as "alizarine black," but more particularly designated as "alizarine black 4 B," to distinguish it from the article theretofore and still imported and known as "alizarine black," both being products of coal tar and dyes having similar properties, but somewhat different in chemical composition, is properly classified as a dye commercially known as "alizarine black," under paragraph 478 of the free list in the tariff law of 1890, and not under paragraph 18, as a coal-tar color or dye not specially provided for.

Appeal by the importers from a decision of the board of general appraisers which sustained the action of the collector in assessing duty upon the merchandise in question.

Albert Comstock, for importers.

J. T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge. The merchandise in question is a black dyestuff. It was classified for duty, under paragraph 18 of the act of October 1, 1890, as a coal-tar color or dye, by whatever name known, not specially provided for. The importer protested, claiming that it was specifically included under paragraph 478 of the free list, which is as follows: "478. Alizarine, natural or artificial, and dyes commercially known as alizarine yellow, alizarine orange, alizarine green, alizarine blue, alizarine brown, alizarine black." The board of general appraisers affirmed the classification of the collector, and the importer appeals to this court.

The article in question is a color and a dye. True, alizarine was originally a vegetable product derived from madder. Technically, there is no such thing as alizarine black, because the true alizarine does not dye black; but the term "alizarine" is applied generally to certain coal-tar dyes which exhibit certain marked characteristics similar to those belonging to vegetable alizarine. Prior to the date of the passage of said act there was a coal-tar dye commercially known as "alizarine black," which was chemically a naphthazarine black, and which was protected by a patent. The merchandise in the present case was not commercially known in the United States prior to 1891. It is a coal-tar dye, which is chemically naphthyl black, and also is protected by a patent.

The questions at issue will be best understood by the following statement: The dye which was commercially known as "alizarine black" prior to the passage of said act, hereafter referred to as "alizarine black S C," and the alizarine black in question, hereafter to be known as "alizarine black 4 B," differ from each other in several respects. The alizarine black 4 B is chemically naphthylamine black 4 B, so that both designations apply to the article here in question. The importers have on certain special occasions, to be hereafter considered, sold their alizarine black 4 B under the name of "naphthylamine black 4 B." It is immaterial that the article in question is not chemically alizarine, because there is no such alizarine derived from coal tar, as already stated. The question is whether the article is "commercially known as alizarine black," under paragraph 478 of the free list. The importer admits that, if the article had been imported and known under another name prior to the passage of said act, the provisions thereof would not apply thereto. But he claims that under the decisions in *Smith v. Field*, 105 U. S. 52, *Newman v. Arthur*, 109 U. S. 132, 3 Sup. Ct. 88, and *Pickhardt v. Merritt*, 132 U. S. 252, 10 Sup. Ct. 80, if said article is a new product coming into existence after the passage of said act, and is in fact alizarine black, and is commercially known as such, it is free of duty, under said law. The counsel for the United States denies these claims. In support of the proposition that it is in fact alizarine black, the importer shows that it responds to certain tests which are recognized as the usual and characteristic tests in determining the question of membership in the family of alizarines. These characteristics are the application to wool mordanted with chrome and tartar mordants, and fastness of color in milling and fulling, and on exposure to sun and air. In these respects it is also like alizarine black S C. The counsel for the United States does not deny these facts. He admits that the term "alizarine" is applied to a class of colors which possess certain marked characteristics. But he relies upon proof that the alizarine black 4 B of the importer differs in certain respects from said alizarine black S C. Thus, it is claimed that alizarine black 4 B is an acid black, while alizarine black S C is not. In fact, acid is used for dyeing with both alizarine blacks; but in the case of alizarine black 4 B the acid is used with the dye in dyeing the wool, while in alizarine black S C the acid is used prior to the application of the dye, and is afterwards washed out, before the dye is applied to the wool. It appears, however, that in the above experiments acetic acid was used with alizarine black 4 B, while oxalic acid was used with alizarine black S C. It further appears that wool dyed with the two alizarines operates differently when a discharging process is applied to it; that is, by the action of certain chemicals one color is discharged or washed out, while the other remains fast. As to the first of these alleged differences, the counsel for the importer shows that different processes have been applied to the two dyes for accomplishing these different results, and that it does not appear that the same process applied to each would not have produced the same results. As to each of said differences, he claims that even though the same tests were applied, and produced different results, as claimed, yet they are not the ordi-

nary or usual tests to which such dyes are subjected in practice, and the results are therefore immaterial; and, further, that the question herein is not answered by a comparison of the differences between alizarine black 4 B and alizarine black S C, but by a determination as to whether the article in question corresponds with the generally recognized tests applicable to the whole family of alizarines, and that the right of alizarine black S C, as well as that of alizarine black 4 B, to free entry, depends upon its similarity to, and consequent membership in, the family of alizarines, as ascertained by said tests. I am satisfied upon the whole evidence that the article in question does in fact belong to the family of alizarines, and is entitled to be known as "alizarine black."

The further question is presented as to whether this article is commercially known as "alizarine black." As already stated, it was first imported in 1891, and was designated by the importers as "alizarine black." Several witnesses testify that it is thus commercially known. But counsel for the United States shows that in the importers' catalogue of coal-tar colors it is advertised both as "naphthylamine black 4 B" and as "alizarine black 4 B." He further shows that on certain occasions purchasers have obtained from the importers cans of said color on which were the words "naphthylamine black 4 B." And he therefore claims that the article in question has not received any such general, universal commercial designation as entitles it to be considered as commercially known as "alizarine black." Counsel for the importer, however, shows that alizarine black S C and naphthylamine black 4 B are each imported by a single house, and that the importer who therefore sells the whole product of alizarine black 4 B generally sells it under said name; that the single instances in which it was otherwise sold were either where the sales were made upon request by the purchaser that the article should be marked "naphthylamine black 4 B," or where there was some misunderstanding as to its name. It further appears that when said article is sold with a printed label it is "alizarine black 4 B," and where it is sold as naphthylamine black 4 B said name is written on the label. Counsel for the importer further contends that, inasmuch as the article is chemically naphthylamine black 4 B, the mere fact that this name, which correctly describes its general chemical composition, has been used under the circumstances above stated, does not affect the evidence that it is commercially known and generally sold as "alizarine black 4 B." I think this contention is sound. In any event, I think the importer has brought this dye within the provision for "dyes * * * commercially known as alizarine black." Finally counsel for the United States claims that a commercial designation must be one existing and recognized in trade and commerce at and prior to the date of the tariff act in which such designation occurred. That this rule is well settled appears from the cases cited. But none of those decisions cover the case of a new article practically identical with that previously commercially known by the same name. In *Dennison Mfg. Co. v. U. S.*, 18 C. C. A. 543, 72 Fed. 258, the court of appeals found that the article in question had in fact been imported prior to the passage of the act of October 1, 1890. It was commer-

cially known under various names, and differed in quality and use from the tissue paper of trade and commerce, and was found by the court to be "an article advanced beyond the condition of tissue paper, into something else." I think the case falls within *Pickhardt v. Merritt*, 132 U. S. 252, 257, 10 Sup. Ct. 82, where the court says as to aniline dyes, which were unknown when the statute was enacted:

"As the court said to the jury, the law was made for the future; and the term 'aniline dyes and colors by whatever name known' included articles which should be commercially known, whenever afterwards imported, as 'aniline dyes and colors.'"

I fail to find any modification in the application of this rule to articles first discovered, imported, and known subsequent to the passage of such acts, and which are commercially known as, and in fact belong to, the class of exempted articles. The decision of the board of general appraisers is reversed.

GORMULLY & J. MFG. CO. v. STANLEY CYCLE MFG. CO. et al.

(Circuit Court, S. D. New York. November 15, 1898.)

1. PATENTS—NOVELTY—COMBINATION OF OLD ELEMENTS.

A patent for a combination cannot be defeated by showing that each of its elements, separately considered, is old, but it must be shown that the combination is old.

2. SAME—ANTICIPATION.

A patent for a device which fails to accomplish the desired end is not an anticipation of one which successfully accomplishes that end.

3. SAME—SUIT FOR INFRINGEMENT—TITLE OF COMPLAINANT.

It is sufficient to enable a complainant to maintain a suit for infringement if it owned the patent at the time the suit was commenced, and continues to own it at the trial.

4. SAME—IMPROVEMENTS IN VELOCIPEDES.

The Jeffery patent, No. 398,158, for an improvement in velocipedes, shows patentable novelty, and the invention was not anticipated.

This was a suit in equity by the Gormully & Jeffery Manufacturing Company against the Stanley Cycle Manufacturing Company and others for the infringement of a patent. On final hearing

Charles K. Ofield, for complainant.

Joseph L. Levy, for defendants.

COXE, District Judge. The patent in controversy, No. 398,158, was granted February 19, 1889, to Thomas B. Jeffery for improvements in velocipedes. The invention relied on has reference to novel features in the construction of the sprocket-wheel, by means of which, the specification asserts, the machine is made lighter, space is saved on the pedal-crank shaft, and the power-communicating wheel may be removed without detaching the crank.

The only claim relied on is the tenth, which sufficiently describes the invention. It is as follows:

"10. In combination with the pedal-crank shaft, the pedal-crank provided with a hub, by which it is secured to the shaft, and with arms, for securing the power-communicating wheel, such power-communicating wheel having

no hub, but having an opening about its center large enough to permit the crank-hub and its arms to pass through, whereby said power-communicating wheel may be passed over the crank and its arms, and secured behind or within the same without detaching the crank from the shaft, substantially as set forth."

The defenses are defective title, noninfringement and lack of patentable novelty.

Of course the claim cannot be defeated by showing that each of its elements, separately considered, was old. The defendants must prove that the combination was old. If they fail in this they fail irretrievably.

The British patent, No. 3,294, granted to Renouf and Boothroyd in 1886 is the defendants' best reference. This is conceded on all sides. If this patent does not defeat the tenth claim it must be sustained.

Although a number of novel and valuable features are pointed out as inhering in the Jeffery invention it is thought that the distinguishing characteristic, and the one which gives it its chief merit, is the arrangement by which the power wheel can be removed and a new one, of different gauge, substituted without disturbing the crank.

The English patent shows a clumsy device which, apparently, never went into successful operation. It seems to be conceded that the English structure cannot be used as the Jeffery structure is used without first making several important changes. The proof leaves no doubt on this subject. It is argued that these changes might have occurred to the skilled artisan. That they did not occur to any one until Jeffery made the invention is evident. They seem simple enough now but invention depended upon their being successfully wrought out. In short, in these changes lies the difference between the commercial failure of the English patent and the widely-recognized success of the patent at bar.

It is a significant fact that the English patentees, having in mind the desirability of making the parts detachable, have only contributed a recipe which shows the art "how not to do it." A patent which fails to show the one feature on which invention rests is valueless as an anticipation.

Without pursuing the subject further the court is of the opinion that Jeffery's contribution to the art constituted an invention, not a great invention, not a primary invention, but one which made a distinct advance in an art crowded with skilled mechanics, and one which the courts should uphold.

There can be no doubt that the bicycle purchased of the defendant corporation and introduced in evidence as "Complainant's Exhibit Defendants' Bicycle" is an infringement. The proof shows, and the memory of the court is in accordance with the proof, that this structure contains the combination of the claim without any material departure therefrom. There is nothing in the record which requires a construction of the claim so narrow as to permit this structure to escape.

The court is unable to find any testimony that the individual defendants have infringed and as to them the bill is dismissed. Consolidated Fastener Co. v. Columbian Fastener Co., 79 Fed. 795, 801.

The criticism of the complainant's title is without merit. If the defendants' proof establishes anything it is that the complainant acquired title to the patent before the assignment introduced by the complainant. It is enough that the complainant owned the patent when the suit was commenced and owns it now. The complainant complied sufficiently with the provision of the law in marking its machines "Patented."

It follows that the complainant is entitled to the usual decree against the defendant corporation.

PALMER et al. v. DE YONGH.

(Circuit Court, S. D. New York. November 15, 1898.)

1. PATENTS—INFRINGEMENT—PRODUCTS USED IN DIFFERENT ARTS.

The rule that an inventor is entitled to the benefit of all the uses to which his invention can be put, whether he knew of them or not, cannot operate to bring within a patent structures belonging to a different art, which do not embody the invention claimed, and resemble it only in some of its subordinate features.

2. SAME—FRINGED VALANCES.

The Palmer patent, No. 474,997, as to its third claim, which is for a valance formed of woven fabric and having a fringe composed of weft-threads, the article being used for the purposes of ornament, is not infringed by a braid or edging intended as a protection for the bottom of women's skirts, though having a fringe similarly woven, the two articles having entirely different functions and belonging to different arts.

This action is based upon letters patent, No. 474,997, granted to the complainant Palmer, May 17, 1892, for an improvement in woven valances for hammocks. The complainant Feder owns an exclusive license to make, use and sell garment protectors under the patent.

The patentee says:

"My invention relates to an improvement in hammock valances or drapery which when applied to the top edge of the hammock will hang in fulled form. The invention consists in a valance or piece of drapery formed of woven fabric in which the woven selvage edge is shorter than the corresponding portion of the fabric intermediate of the selvage edge and fringe. My invention further consists in a valance or piece of drapery formed of woven fabric, having at one of its edges a fringe formed of weft-threads, which enter into the weaving of the body portion of the hammock."

Again he says:

"When the selvage edge or that portion where the warp has been fed and taken up more slowly is applied straight along the edge of the article or along the support from which the valance is to hang, the portion where the warp has been fed and taken up more rapidly and which has advanced in the weaving faster than the edge will hang in folds, presenting an appearance quite similar to that which would be obtained by gathering the edge, as is commonly done. To form the fringe, the warp is omitted along the central portion of the blank for a distance equal to twice the length of the fringe, so that when cut through the middle the fringe will hang from the opposite edges of the woven fabric at the point where the warp-threads on the opposite sides of the center of the blank are introduced. To increase the body of the fringe I weave more weft-threads, *v.*, across the central portion of the fabric than at the edges—for example, by holding open the sheds of warp from the outer edges of the blank up to a point a short distance from where

the fringe hangs from the edge of the fabric, (up to a point, c, for example, as shown in the accompanying drawings,) while the weft-thread is carried one or more times back and forth, and then proceeding with the weaving. This being repeated at short intervals throughout the weaving will as a matter of course increase the number of weft-threads at the center, and when the blank is cut will provide a thick handsome fringe."

The third claim only is involved. It is as follows:

"(3) A valance formed of woven fabric and having a fringe composed of weft-threads which enter regularly into the weaving of the woven portion of the valance, and of additional weft-threads which engage a portion only of the warp-threads at the fringe edge of the woven portion, substantially as set forth."

The defenses are noninfringement, anticipation, and want of patentability.

W. Laird Goldsborough, for complainants.

Louis C. Raegener, for defendant.

COXE, District Judge. The third claim of the patent has reference to a valance for hammocks, canopies, lambrequins and similar articles where hanging drapery is commonly used. The valance is composed of a woven fabric and a fringe. The fringe is made of the regular weft-threads of the fabric and additional weft-threads which engage a portion only of the warp-threads at the fringe edge of the fabric. The introduction of the additional threads tends, of course, to thicken the fringe. When completed the valance hangs from the hammock body "in full form," or in graceful wavy folds. As described in the specification and shown in the drawing the valance performs no function of any kind, certainly no useful function. It is designed solely for ornament.

The complainant Feder, in whose interests this suit is prosecuted, does not deal in hammocks, furniture or upholstery of any kind. He and the defendant are engaged in selling a braid or edging intended as a protector for women's skirts. This braid is about half an inch in width and is sewed to the bottom of the skirt so that its lower edge, which consists of a thick brush or fringe, extends a short distance below the skirt. It is said that this arrangement is useful and popular, the edging tending to protect the skirt from wear. To the uninitiated it would seem that the brush must act as a dust collector where the filth of the pavement will find a lodgment. In view, however, of the enormous sales reported in the testimony, this view is probably erroneous.

It is unnecessary to decide whether, in view of Exhibit 6 and the "Hensel sample," it involved invention to produce the valance of the claim, for the reason that the court is of the opinion that the claim cannot be broadened to cover the defendant's braid without including these exhibits also.

It is unquestionably true that the inventor of a machine is entitled to the benefit of all the uses to which it can be put whether he knew of them or not. But the defendant must use the invention which the patentee has described and claimed. The rule cannot operate to sweep within the patent structures which do not embody the invention claimed and resemble only some of its subordinate features. For

instance, one who has patented a new hawser for towing vessels at sea would hardly expect to cover a shoestring even though twisted on the same principle. A manufacturer of tooth brushes may proceed without fear of molestation from the patentee of an improved street sweeper even though the method of inserting the bristles is alike in both cases and was first adopted by the latter. A patent for a shell for a 13-inch rifle cannot be tortured into covering the head of a lead pencil or the ferrule of a cane. In the present case the claim is expressly limited to a valance and the range of equivalents which the patentee thought might be included by him is plainly indicated in the specification. They all are designed for uses similar to that of a hammock valance. The braid of the defendant is in no sense a valance or the equivalent of a valance. The one is alleged to be useful; the other is known to be ornamental. The sole function of the braid is to protect the skirt and to remain unseen; the sole object of the valance is to be seen and add to the beauty of the hammock.

The legitimate rights of the holder of the patent cannot be invaded by one who protects from wear the bottom of women's skirts. The two fields are wide apart and have nothing in common. If the defendant were sued as a hammock maker and if "Velour Edge Mohair Skirt Binding" were found in the prior art it can be imagined with what contempt it would be denounced by complainants' expert witnesses if offered as an anticipation. They would dismiss it as belonging to a totally different art and having nothing whatever to do with the patented device. It is said that if size, length of fringe and stiffness are to be considered it will be difficult to determine where the dividing line between fringe and brush is located. This may be true in some cases which may be imagined, but here the defendant's braid lies far outside of the debatable territory. The bill is dismissed.

McTAMMANY et al. v. PAILLARD.

(Circuit Court, S. D. New York. November 15, 1898.)

PATENTS—INFRINGEMENT—DEVICE FOR FEEDING AUTOMATIC MUSICAL INSTRUMENTS.

The McTammany patent, No. 290,697, claim 8, which relates to a device for feeding, winding, and guiding the perforated music sheet in automatic musical instruments,—the distinguishing feature consisting of mounting the two rolls on the same frame, so they can be simultaneously turned up out of the way,—is not for a primary invention, and is entitled to only a narrow range of equivalents. It is not infringed by a music box having a removable metal note disk which is revolved by means of toothed wheels.

This was a suit in equity by Alexander McTammany and the Regina Music-Box Company against Alfred E. Paillard for the infringement of a patent relating to automatic musical instruments. On final hearing.

Antonio Knauth and Joseph A. Stetson, for complainants.
Edwin H. Brown, for defendant.

COXE, District Judge. This suit is brought by the owner and the exclusive licensee of letters patent, No. 290,697, granted to the complainant Alexander McTammany, December 25, 1883, for improvements in organs or other analogous wind instruments. The present controversy is confined to that part of the invention which relates to "the device for feeding, winding, and guiding the perforated music sheet." The patent contains 17 claims, but the eighth is the only one relied on. It is as follows:

"(8) In an automatic musical instrument, the combination with a perforated music sheet of a frame or rack, which is removable from said sheet, and carries one of the feed rolls, and also a presser bar or roll, substantially as set forth."

The defenses are lack of invention and noninfringement.

The apparatus described and claimed has reference to wind instruments. It consists of feed rollers geared together so that each contributes to propel the music sheet. The sheet is made of paper, or other material, and is constructed somewhat like a Jacquard pattern card. When the sheet is fed forward by the feed rolls it travels under a presser roll which holds it in the proper position. The upper feed roll and the presser roll are both mounted upon a hinged rectangular frame which can be swung up, the sheet removed, a new sheet substituted and the frame turned back into place again. The distinguishing feature of the invention is said to reside in thus mounting the two rolls on the same frame so that they can be simultaneously turned up and out of the way. The invention is not a primary one. The Mennons patent of December 3, 1866, relates to improvements in apparatus for automatically playing organs and other similar instruments. It shows a perforated music sheet drawn by feed rolls under a hinged retaining and presser bar. The Hunt patent of November 22, 1871, shows a similar apparatus with the additional feature that the retaining bar is a grooved roller which presses down the music sheet, means being shown for locking the roller in operative position. The Debain patent of August 29, 1846, shows a hinged bar carrying a roller which presses down on the music sheet and holds it in place. It is plain, then, that the McTammany invention, which was made 15 years ago, must be confined to mechanisms having, at least, the same general characteristics as those described and shown. The complainants are not entitled to a broad range of equivalents. The claim cannot be construed to include all instruments where music is produced automatically by advancing a music sheet by feed rollers and holding it in position by a frame which carries a presser roll and is removable from the sheet. It is not pretended that the defendant uses the elements of the combination of the eighth claim, but only equivalents therefor. As before seen the complainants are only entitled to a narrow range of equivalents, but it is thought that the defendant's device differs so radically from the complainants' that he cannot be held as an infringer even if the claim were entitled to a broad interpretation. The defendant's instrument is not an organ but a music box. It has no paper music sheet but a revolving metal note disk. This disk is perforated but not in the sense of the patent. The perforations do not make the music. This

is made by the projections struck up from the disk coming in contact with the star wheels. The disk is revolved by a toothed wheel which engages with downwardly projecting teeth arranged around the outer edge of the disk. There are no feed rolls like those shown in the patent. The disk is held in position and guided with precision by means of a pin which engages with a central hole in the disk; there are no side guides as shown in the patent. The disk is held down by a rod hinged at the outer end and latched to the pin at its inner end. This rod can be unlatched, turned up and the note disk removed. It has no rotary motion of its own, but it is provided with a number of loose antifriction rollers which enable the disk to revolve easily. These rollers are not geared to the toothed wheel, have no motion of their own and are not feed rollers in any sense. Their presence does not advance the disk the fraction of an inch. The upper feed roll of the patent is certainly absent. There is no substitute whatever for the rectangular rack of the patent, but the hinged rod is suggested as an equivalent. This contention cannot be maintained. The argument to prove infringement is most ingenious, but it is based upon the erroneous assumption that the patentee preceded all other makers of automatic musical instruments and hit upon a combination so fundamentally novel as to subject to tribute all those who subsequently entered the field. What he did in fact do was very far from this. The bill is dismissed.

MORRIN v. LAWLER.

SAME et al. v. EDISON ELECTRIC ILLUMINATING CO. OF BROOKLYN.

(Circuit Court, E. D. New York. October 6, 1898.)

Nos. 1, 2, and 3.

1. PATENTS—ANTICIPATION.

When a machine created pursuant to the specifications of a patent has reached in its domain the greatest distinction for useful operation, while others who have sought the same ends have failed substantially, and when the rights are of great pecuniary value, and have enlisted large financial undertakings, a court of equity should not be diligent to discover nice resemblances to former inventions.

2. SAME—IMPROVEMENTS IN STEAM GENERATORS.

The Morrin & Scott patent, No. 309,727, and the Morrin patent, No. 463,307, for certain improvements in steam generators, construed, and held valid, not anticipated, and infringed as to claim 2 of the former and claims 1 and 2 of the latter.

3. SAME—SECTIONAL CASINGS FOR STEAM GENERATORS.

The Morrin patent, No. 463,308, for improvements in sectional casings for steam generators, held valid, not anticipated, and infringed.

These were suits in equity for the infringement of three patents owned by the complainant Thomas F. Morrin relating to improvements in steam generators.

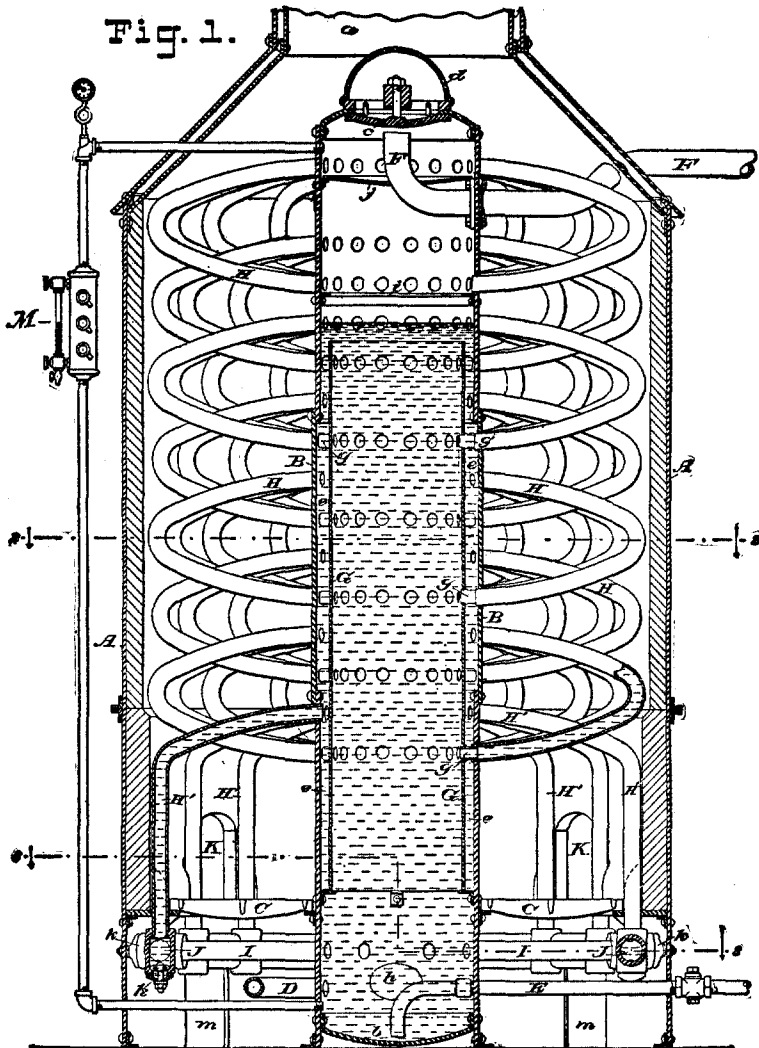
Briesen & Knauth, Arthur von Briesen, and Daniel O'Connell, for complainants.

Frank B. Lawrence and Edwin H. Brown, for defendants.

THOMAS, District Judge. On 23d December, 1884, there were issued to the complainant, Thomas F. Morrin, and his co-inventor, Walter W. Scott, letters patent of the United States numbered 309,727, for certain improvements in steam generators, of which, by assignment bearing date January 28, 1888, said Morrin became the sole owner. Such letters are marked "Exhibit 2." On 17th November, 1891, there were issued to said Morrin letters patent numbered 463,307, for certain improvements in steam generators, and these letters are marked "Exhibit 4." On 17th November, 1891, there were issued to said Morrin letters patent numbered 463,308, for certain improvements in sectional casings for steam generators, and these letters are marked "Exhibit 5." For some time previous to the year 1895, said Morrin, in the city of Brooklyn, N. Y., under the name of the "Clonbrock Steam-Boiler Works," constructed what was known as the "Climax Boiler," purporting to make the same pursuant to said patents, or some of them; but on 22d January, 1895, Morrin executed to the Clonbrock Steam-Boiler Company, a corporation, an agreement licensing said company to manufacture and sell boilers made pursuant to said letters patent. The agreement was executed in behalf of said company by Thomas J. Lawler, a defendant, who was a stockholder in, and a director, vice president, and general manager of, such company, and contained certain stipulations to be kept by said company, among which was the following: "The party of the second part expressly admits the validity of the several letters patent enumerated in this agreement, and agrees not to contest the same." Lawler's official relation to the company continued until the early part of the year 1896, when he was not re-elected as a director, whereupon he retired from official connection with the company, but continued to hold 450 of the 2,000 shares of stock issued by it. Previous to this time, both before and after the formation of the company, Lawler had been not only a trusted and confidential manager in the manufacture and marketing of Climax boilers, and the general conduct of the business relating thereto, but also had complete knowledge of the business, in its details and ramifications, and was in many instances known to persons who had purchased and were using the Climax boiler, or knew of it and its manufacturers directly or by reputation. Previous to Lawler's disconnection from official connection with the company, there is evidence of hostility on his part inconsistent with a loyal representation of its interests, which appears in an attempted association of persons to manufacture boilers similar to, or identical with, the Climax boilers, and compass the financial embarrassment of the said company. Following Lawler's actual disconnection with the company, he employed some of its skilled workmen, and, under the name of the "Columbian Steam-Boiler Works," undertook the manufacture of boilers that in all essential particulars were duplications of the Climax boiler, and in May, 1896, actually began the construction of such a boiler for the defendant the Edison Electric Illuminating Company of Brooklyn; and during such year Lawler completed, and the Edison Company accepted, such boiler, notwithstanding a notice to each of them that the boiler was an infringement of Climax boilers, four of which boilers, bearing the patent stamp of the complainant,

had been purchased by and were in use by such Edison Company before the erection of the boiler by Lawler. It results from what has been stated that the parties defendant in these actions, if they be infringers, became such with every opportunity of knowing the facts that support or impair the complainant's claim. It should be added that the boiler for the Edison Company is claimed to have been erected pursuant to letters patent No. 562,993, for certain new and useful improvements in boilers and steam-generators, and design patent No. 25,982, for a new and original design for a boiler tube,

EXHIBIT 2.



both of which letters were granted to William H. Weightman,—the first on the 30th day of June, 1896, and the second on the 1st day of September, 1896. The defendants contend (1) that the boiler constructed by them is not an infringement of the machine covered by the letters patent issued to or owned by Morrin; (2) that all constructions, infringement of which is claimed by Morrin, had been anticipated at the date of issuing the several letters patent to him, or to him and Scott, purporting to cover such construction; (3) that the defendants were authorized to construct the boiler under the letters patent issued to Weightman.

The first question to be considered is the right granted to Morrin & Scott, and to Morrin alone, claimed to have been infringed, and the state of the art relating to his alleged inventions at the time of his applications for letters. Exhibit 2 (No. 309,727), by the second claim of the specifications, covered—

"A steam generator provided with tiers or horizontal series of radial, double-branched tubes, H, both branches of which enter the generator cylinder, one above the other, and the upper branches of one series constructed to enter said generator cylinder above the point or line where the lower branches of the next tier above enter it, substantially as set forth."

Exhibit 4 (No. 463,307), by its first claim, provides for a—

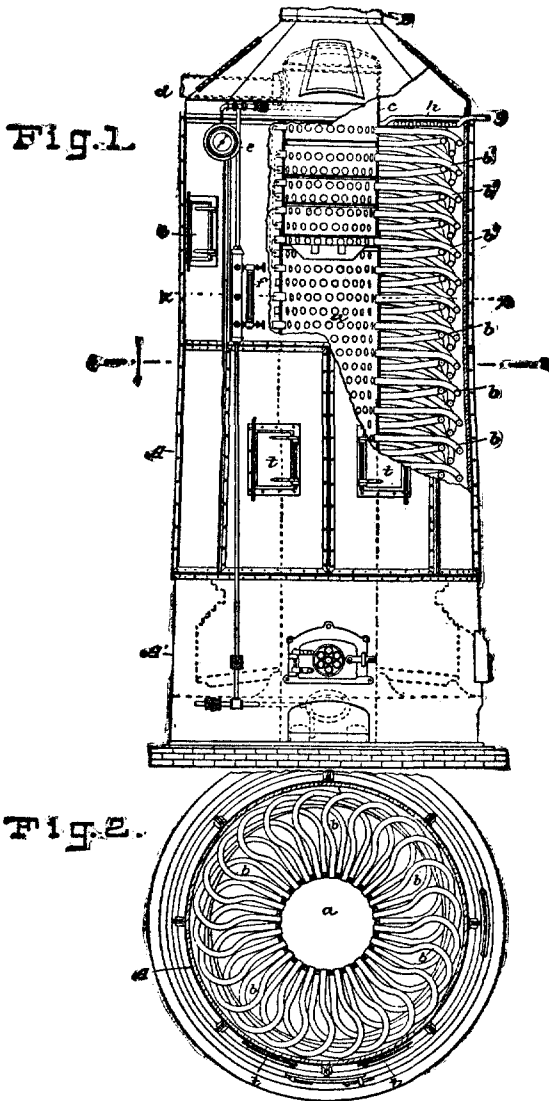
"Steam generator having an upright generator cylinder, provided with tiers of double-branched, radial, obliquely arranged generating tubes, both branches of which are secured in the shell of said generator cylinder, and extend therein to an equal extent, said tubes being arranged about the entire periphery of the cylinder and overlapping one another, as set forth."

The particular form of these tubes is covered by the second claim of Exhibit 4 (No. 463,307), which is as follows:

"A steam generator having an upright generator cylinder, provided with tiers of generating tubes, b, of loop-like form, said loop having a pear-shaped outline when seen in plan, and each loop having at one side a lobe formed by the short out-curve at b^x and the short in-curve at b^{xx}, the planes of the loops in the tubes being set obliquely to the axis of the generator cylinder, substantially as set forth."

There are several characteristics of this improved steam generator: (1) The radial tubes are to be heated by an annular grate surrounding an upright generating cylinder. (2) The tubes are arranged so that the upper branches of one tier overlap, and enter the cylinder above the lower branches of the next tier above. See Exhibit 2. (3) The tubes are set obliquely to the axis of the generator cylinder. See Exhibits 2 and 4. (4) The tubes extend to an equal extent in the generator cylinder. See Exhibit 4, claim 1, modifying Exhibit 2, wherein provision was made for two cylinders, each receiving one end of the tube. (5) The tubes are of ogee form, described in claim 2 of Exhibit 4. The boilers constructed by the complainant, known as the "Climax Boiler," and the boiler constructed by the defendants, possess all these features, and such features give utility to such boilers. For the purpose of showing anticipation, the defendants, upon the argument, limited their contention to the patents now to be discussed, save in the matter of the casing of the boiler.

EXHIBIT 4.



The Hazleton boiler is described in letters patent No. 247,910. The letters cover—

"The combination, with an upright cylindrical boiler, having a series of radiating tubes, closed at their outer ends, and arranged in successive planes, one above the other, the tubes and spaces of the several series alternating with each other, of a series of vertical tubes, set in the spaces between the

outer ends of said radiating tubes, and extending from near the water line to the bottom of the central boiler, and communicating therewith at their ends through horizontal pipes."

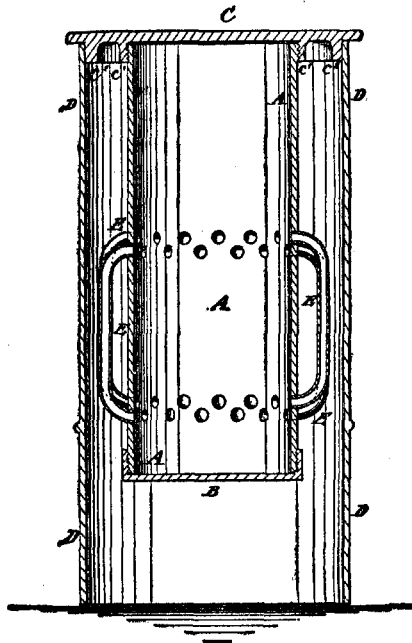
These radiating tubes are in the specification said to have the following purpose:

"A maximum fire surface is obtained in a given space, and great economies in fuel are thereby made possible."

Hence the office of the tubes was to furnish greater heating surface. It appears from the evidence of Mr. Kennedy, the president of the company owning the Hazleton patent, that, after erecting one boiler with the circulating tubes, they became filled with mud, developed leaks, and were abandoned.

It is convenient in this order to examine the patent for which letters (No. 171,017) were issued to Heaton in 1875, for a new and useful improvement in upright tubular boilers. The claim makes no reference to tubes collaterally applied to the boiler, but the description provides:

"E are a set of upright tubes placed at a little distance from the lower part of the shell of the boiler, H, and the upper and lower ends of which are bent inward, pass through, and are secured in holes in the shell of the said boiler, H, so that the water in the boiler may circulate freely through the said tubes. With this construction, the products of combustion, as they pass up around the boiler, H, also pass around the tubes, E, so that the water may be in contact with a very large heating surface, and may thus generate steam very rapidly."



The grate in this instance was not annular, and although the device of tubes, which were incidents of the invention, assured an increased heating surface, they also aimed at circulation of the water. The description in the specification makes no suggestion of tubes alternating in length, or inclining to the axis of the cylinder, but the figure shows vertical tubes, the ends of one set entering the cylinder, one above and one below the ends of the adjoining tube.

Attention was also called to the Rogers & Black patents. The letters covering these were numbered 41,323 (reissue 2,130), 55,539, 65,280, 65,281. All of these patents, either by the illustrative figure, or the description in the specifications, suggest these features: (1) The boiler is placed over the grate; (2) tubes, one end inserted at the lower and the other end at the upper portion of the boiler; (3) these tubes may be so arranged that the end or ends of some of the tubes enter the boiler nearer its end than do the end or ends of other tubes; (4) the tubes may be vertical, or spirally or helically inclined; (5) the function of the tubes is to present a greater heating surface, and to afford a medium for the uniform circulation of water within the boiler. As these Rogers & Black patents, beginning in 1865, follow each other to May 28, 1867, the persistent effort on the part of the inventors is to bring the upper ends of the tubes near to the water line above, and the lower ends nearer the inferior end of the boiler, and to avoid abrupt bending of the ends of the tubes, and to give to "the tubes a gentle curvature or bow shape along their length," which was beneficial when the tubes were expanded by heat. Upon examining these inventions, the consideration is suggested that the inventors had no conception that entering the tubes at different levels of the cylinder would have any other effect than to prevent impairment of the strength of the boiler. Hence the preservation of the strength of the boiler prompted the arrangement of tubes. Thus, in letters 41,323 it is said:

"By connecting the upper ends of the tubes, B, to the boiler at points above those where the tubes, B', are secured, and by adopting the same plan with the lower ends of the tubes, the piercing of the body of the boiler at points too near each other is avoided, and a great number of tubes are obtained without wounding the boiler."

This concern for the strength of the boiler, and the consequent alteration in the length of the tubes, is illustrated in the specifications of letters 55,539. It is doubtful whether the inventors conceived that the fire acting upon the flues would produce circulation, although it might permit the same. Thus, letters 41,323 (reissue 2,130) show that it was considered and claimed that a circulation of water between the upper and lower portion of the boiler would be obtained by means of the boiler and attached tubes, although it would seem that it was thought that the tubes would rather permit circulation, than aid in causing it. It is also suggested (see letters 41,323) that the tubes may be used in a spiral or inclined position, "as they tend to direct the products of combustion in a spiral course to the chimney, and to thereby increase the heating action on the boiler." The Rogers & Black boiler was tested at the Philadelphia Exhibition, and showed a very high rate of evaporation per square foot of heating surface,

but the lowest degree of evaporation per pound of coal from actual temperature and pressure; and, if the experiment of Prof. Morton is to be accepted, the tubes employed in connection with the Rogers & Black boiler furnished a relatively very inferior extent of productive heating surface.

It now becomes important to consider whether these letters patent enumerated anticipated Morrin's alleged invention. On reference to the specifications connected with letters patent 309,727, issued to Morrin, the following facts appear: (1) The invention relates to a vertical "generator shell provided with lateral tubular branches arranged within a furnace shell, provided with annular grate or fire bed"; (2) the improvement aims at the production of free circulation through numerous tubular branches, extended and efficient heating surface, etc. This result, which seems to have been sought in the manufacture of boilers, the complainant claimed to have attained by adjusting into upright generating cylinders, with annular grates, series of tiers of tubes, arranged one above the other, whose ends should enter, one an inner and the other the outer of two concentric cylinders. It was further conceived that the tubes should be staggered, and set obliquely to the axis of the cylinder. The object of staggering the tubes was, not to preserve the strength of the boiler, and not merely to permit circulation, but to furnish an active, concurring cause of circulation. In the case of the Rogers & Black patents, the arrangement of the tubes into long and short series was to save wounding the boiler and impairing its strength. In the Morrin boiler, the tubes were to become agents of circulation, by compressing many of them in overlapping tiers, within a small area, and they were to have such form and inclination as would enable them to receive and impart the maximum heat, and expedite circulation to the degree of highest usefulness. Hence the specifications (Exhibit No. 2) contemplated double cylinders rising to such height as in a perfected state should furnish the power desired, and from it should radiate double-branched and overlapped tubes, tier upon tier, inclined so as best to receive the heat that arose from the annular fire bed beneath. This was the machine intended, and is the machine for which the second claim of the Morrin & Scott patent provided. It is true that the second claim does not show that the generator cylinder should be vertical, surrounded by an annular grate, or that the tubes should be obliquely arranged; but the description shows it fully, both by words and illustrative figures, and reference is made to these by the words of the claim, "substantially as set forth." By the subsequent patent (letters 463,307, Exhibit 4), it is provided that the ends of the tubes shall enter a single cylinder to an equal extent, and a particular form of tube is claimed. Hence the machine is complete, and a combination of an annular grate, with tubes in form unlike others before fashioned or described, arranged in tiers not before described, to perform functions not before suggested, is covered by the terms of the letters. The result is a machine which so competent a judge as Mr. Edison pronounces the "best boiler yet invented." Increased heating surface and more active circulation have been desiderata in boiler manufacture for many years, and it cannot be denied that

Rogers & Black, and also Heaton, sought the results by a boiler placed over a fire bed, and by the use of radial tubes. But the chief resemblance is that the tubes had two ends entering the cylinder, and that the tubes, to save the boiler, entered it at different levels, and a spiral or helical form was suggested, to give the products of combustion a spiral direction to the chimney. But a machine, compressing within a narrow shell tubes in proximate and interlocking tiers, laid obliquely about an upright cylinder, so as to obtain the greatest amount of impinging heat, and thereby begetting circulation and consequent rapid and economic heating, in the estimation of the court, was never created before the Morrin & Scott invention. The specifications in their first patent (Exhibit 2) show that they saw with distinctness the combination, the parts to be used, the function of each part, and the harmonious working of the whole. In the second patent, the availability of a single cylinder was developed, and it is not apparent that this was anticipated by the specifications of the first patent. The defendants contend that the use of the ogee form in both branches of the tube is not an infringement, and that such form is not patentable. The ogee tube seems to have the precise form that gives the most beneficial results. If a tube bent into any form would not show invention, upon the theory that change of the simple vertical form with curved ends, to any other shape, was but a change in degree, and what any skillful mechanic could do, then there is no invention. But, as in the case of the whole machine, Morrin developed a perfect machine, where all others seeking the same end had tried and failed; and, although skilled mechanics abound, no one had conceived the ogee form of tube, and, when Morrin invented it, it was so faultless that the defendants appropriated and employed it in duplication in the machine manufactured by them. The obvious condition is that the defendants have copied the complainant's machine, and have done so because it had obtained and deserved a supreme commercial reputation and value; and it is equally obvious that such a machine had no existence before its development by Morrin & Scott, although previous inventors had, with a view of permitting circulation between the top of the boiler, employed radial tubes, and that too with limited success, and had used tubes of different lengths for the prudential purpose of preserving the boiler, and had suggested spiral tubes to give the products of combustion a spiral course towards the chimney. This use of parts in a manner and form and for a function so entirely different from that existing in the case of the complainant's boiler does not, it is considered, furnish a shield for the defendants.

The next inquiry relates to the outer casing of the boiler, which the defendants have appropriated literally. It is proved and admitted that every component part is old and without novelty. The complainant, Morrin, had a problem to solve. He wished to provide a casing for an upright, steam-generating cylinder, about whose body should cluster ascending tiers of interlocking tubes, which should receive the direct impinge of the heat from an annular fire bed located directly under them. This casing must contain the heat within these tubes. This necessitates durability and immunity from burning. If one of the many tubes should leak at a joint or elsewhere, some ar-

rangement must exist to enable it to be located and repaired without removal of the entire casing. This required divisions of the casing. Such divisions necessitated devices for combining the parts, and the establishment of an extended vertical structure in such manner that a part could be removed,—demanded means of so attaching the parts that they could be conveniently separated, and yet possess strength in combination. Morrin studied and fashioned a series of drums, and placed one upon the other, and he gave them flanges at either end, so that each could be bolted to its neighbor, and each drum was composed of sections flanged outwardly so that they could be bolted together, and he lined each section with removable fire bricks. There was his perfected structure placed about the boiler in parts, marshaled into a completed and secured whole, with each part and subpart capable of severance, and held and braced in position by the outwardly extending flanges. The defendants deny to this combination invention or novelty, because similar flanges had been used before to hold component parts of machinery in combination, and because fire bricks had been used customarily to defend the walls of furnaces and similar structures; and it is urged that any skillful mechanic would have achieved the combination, if the duty had been demanded of him. The demand for casings for vertical boilers had been long existing. Why had it not been met? Because, with numerous brains undoubtedly considering it, no brain had studied out this plan, which up to this time is apparently of superlative benefit. All these parts, old in themselves, have been summoned to take new forms, and, as parts of a harmonious whole, to aid in a new function. To these parts the defendants have added nothing, from them they have subtracted nothing, as if the previous combination were at the very point of useful and perfect arrangement. This is not merely an aggregation of parts for new use. They have a new action or duty. The flanged extremities of the several plates exist, not only as separable joints, but also act as supporting and bracing arms for the different parts, securing the casing in position under the operation of the furnaces. Sectional drums have been long used, but it is not shown that they have been superimposed, and made removable in whole, or in the several sections composing them, to turn back heat into the radiating tubes of a boiler, and for that purpose lined with fire bricks fitted to the several separable parts. The combination as a whole performs a duty that no combination of such parts has performed before, and that gives it patentability. The law intends that the patent shall be preserved, unless its invalidity appear beyond a reasonable doubt; and when a machine created pursuant to the specifications of letters patent has reached in its domain the greatest distinction for useful operation, while others who have sought the same ends have failed substantially, and when the rights are of great pecuniary value, and have enlisted large financial undertakings, a court of equity should not be diligent to discover nice resemblances to former inventions, especially in behalf of a person who had recognized its validity through years of service in commending it to the public, and whose own signature acknowledged its validity.

The conclusion of the court is that the defendants have infringed

the rights secured to the complainants concerning the combined machine covered by the second claim of the first patent (letters patent Exhibit 2), and the first and second claim of letters patent Exhibit 4, and have infringed the rights concerning the shape of the tubes, secured to the complainant by the second claim of letters patent Exhibit 4, and have infringed the rights concerning the improvements in sectional casings secured to the complainant by letters patent 463,308 (Exhibit 5). Decrees will be prepared pursuant to this opinion, and settled upon the usual notice.

OREGON R. R. & NAV. CO. et al. v. BALFOUR et al.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1898.)

No. 435.

1. ADMIRALTY—SUIT BY SHIPOWNER TO LIMIT LIABILITY—POWERS OF COURT.

The powers of an admiralty court in proceedings instituted by shipowners, under Rev. St. §§ 4283, 4284, to limit their liability, are as extensive, and its remedies are as effective, as are those of a court of chancery, where its jurisdiction is invoked in an equitable proceeding.

2. SAME—FAILURE TO SURRENDER VESSEL LIABLE—POWER OF COURT TO SEIZE.

Where shipowners have invoked the jurisdiction of a court of admiralty by a petition to limit their liability, under Rev. St. §§ 4283, 4284, and, having thereby secured the stay of proceedings by libelants, surrender but one of two vessels held by the court to be liable, the court, having full equitable powers to adjust the rights of all parties interested, is not bound to dismiss the proceedings for that reason, but may by its own process, or its own order, seize the other vessel, and make distribution of the entire fund which it was the duty of the petitioners to tender by their petition; and such is the proper, and only equitable, course, where, by reason of the proceedings, suits by libelants have been delayed for a number of years, during which the shipowners have become insolvent.

3. SAME—MANNER OF SEIZURE.

It is not material in such case, where the vessel has been brought into court, and her owner has stipulated to pay her appraised value, whether or not she was brought in by the appropriate process.

4. CORPORATIONS—REORGANIZATION—NEW CORPORATION AS PURCHASER WITHOUT NOTICE.

A reorganized corporation, having the same officers and attorneys as the old, and succeeding to its property by purchase at a receiver's sale, is not a purchaser of such property without notice of the rights therein of parties to pending litigation between them and the old corporation involving the right to a lien on such property, and cannot relitigate in such suit questions which have been adjudicated as against the old corporation.

5. ADMIRALTY—SUIT TO LIMIT LIABILITY—DISTRIBUTION OF FUND.

Where, in proceedings on the petition of shipowners to limit their liability to libelants of a vessel, their petition is granted, and the fund in court is insufficient to pay in full the amount found due to one defendant, the petitioners cannot complain that a portion of it is erroneously distributed to other claimants.

6. RES JUDICATA—QUESTIONS NOT RAISED ON FORMER APPEAL.

In a suit by shipowners, under the statute, to limit their liability to certain libelants of vessels, the court adjudicated the claims of the defendants, and distributed between them the fund in court. An appeal was taken by the defendants, and the decree was reversed, on the ground

that the petitioners had not surrendered all the property liable; but on such appeal no question was raised as to the validity of the claims allowed to the several defendants, nor was such question raised by new pleadings after the case was remanded. *Held* that, as between the defendants, the validity of the claim of each was *res judicata*, and could not be questioned by any of the other defendants on a subsequent appeal.

Appeal from the Circuit Court of the United States for the District of Oregon.

C. E. S. Wood, for Balfour, Guthrie & Co.

W. W. Cotton, for Oregon R. R. & Nav. Co., Oregon Ry. & Nav. Co., and Oregon Short Line & U. N. Ry. Co.

Andros & Frank, for Malvina Short and Sven Anderson.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This is the second appeal of this case. In October, 1892, the steam towboat Ocklahama had the barge Columbia in tow at a wharf in Astoria, Or. There was a collision against the wharf, and the barge sank, damaging wheat belonging to Balfour, Guthrie & Co., valued at \$18,000, and killing Marshal Short, the captain, and John August Petersen, a deck hand, of the Ocklahama. The barge and the towboat were the property of the Oregon Railway & Navigation Company, but were leased, with the other property of said company, to the Oregon Short Line & Utah Northern Railway Company for a term of 99 years. Balfour, Guthrie & Co. instituted a libel in personam against the corporations to recover for their loss, and the representatives of Short and Petersen were about to bring suits to recover for the death of their intestates. The two corporations then joined in a petition in the admiralty court to limit their liability, under the provisions of sections 4283 and 4284 of the Revised Statutes, and prayed for an injunction against all proceedings against them or said vessels. At the same time the petitioners surrendered the appraised value of the barge Columbia, in the sum of \$100, and sought by their petition to limit their liability to that amount. The court so decreed, but on appeal to this court it was held that the petitioners should have surrendered the towboat Ocklahama, and that, so far as the liability was concerned, the tug and the tow constituted but one vessel. 19 C. C. A. 436, 73 Fed. 226. A mandate was issued from this court, directing further proceedings in the court below in accordance with the said ruling. At the time of the collision, and at the time of instituting the proceeding to limit their liability, both corporations were solvent; but by the time when the mandate from this court was entered in the circuit court they had both become insolvent, and had gone into the hands of receivers. Application was made to the district court, on behalf of Balfour, Guthrie & Co., for an order directing that the receiver of the Oregon Railway & Navigation Company be made a party to the proceedings; but the court denied the order, and declined to allow the receiver to be made a party, or to declare him a trustee, under section 4285 of the statutes, creating limitation of liability. The court ordered, however, that Balfour, Guthrie & Co. have leave to seize the Ocklahama. Applica-

tion was then made to the court for leave to issue an order of seizure, in the nature of an order of sequestration, to bring the Ocklahama into court. This order was denied, the court holding that no particular order was necessary to warrant the marshal to seize the vessel. The Ocklahama was then seized under the regular process of the court. She was appraised at \$8,600, for which sum the Oregon Railroad & Navigation Company, the successor in interest of the Oregon Railway & Navigation Company, gave a bond, and obtained possession of the vessel. The Oregon Railroad & Navigation Company then made application to be allowed to appear and contest the question of the liability of said vessels for the injury; contending that it was a bona fide purchaser of the Ocklahama from the railway company, and that it had never had its day in court, and that the question of the liability of said vessels for the injury was still open to adjudication. The court denied this application, proceeded to adjudge the injuries to the appellees in this case, fixed the same at the total sum of \$24,018.79, and ordered the application of the fund in court to the payment, pro rata, of said claims. On appeal to this court the appellants the Oregon Railway & Navigation Company and the Oregon Railroad & Navigation Company now contend: First, that the district court had no power, under the mandate of this court, to enter any decree imposing any liability upon the Oregon Railroad & Navigation Company or the steamer Ocklahama, and that the decree appealed from is not in accordance with the opinion of this court; second, that under the mandate of this court the district court was without authority to issue process against the Ocklahama, or to cause her seizure; third, that the district court erred in seizing said vessel, for the reason that no libel in rem had been filed against her; fourth, that the court erred in seizing said vessel, and in entering the decree appealed from, for the reason that the suit was commenced to limit the personal liability of the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, and was a suit in personam, and that by the seizure of the vessel it has been changed to a suit in rem, which is contrary to the admiralty rules; fifth, that if the petitioners in the suit to limit liability were not entitled to the relief they prayed for, by virtue of having surrendered the barge Columbia, then it was the duty of the district court, under the mandate of this court, to have dismissed the proceeding, and to have permitted the appellees to adopt such remedies as they might have deemed proper against both or either of said corporations, or to have confined the relief granted to said appellees to personal decrees and judgments against said two corporations, or either thereof; sixth, that the court erred in not permitting the Oregon Railroad & Navigation Company to defend, and in refusing to permit it to introduce evidence, and in depriving it as claimant of the Ocklahama without a trial; seventh, that the court erred in decreeing that the appellees in this case had any interest in the Ocklahama superior to the right of the said Oregon Railroad & Navigation Company, acquired by purchasing the steamer at the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company; eighth, that the court erred in finding that Malvina Short and Sven Anderson

should recover any sum whatever, since it appears from the evidence and the findings of fact that the injuries which their intestates received were the result of their own negligence, or that of their fellow servants; ninth, that the court erred in making any decree against the Ocklahoma or her present owner, for the reason that there is no evidence that the towage services which she rendered were not fully performed and completed at the time when the injury occurred. Balfour, Guthrie & Co. appeal from that portion of the decree which awards a portion of the fund in court to the representatives of Short and Petersen; contending that the said Short and Petersen came to their death through the negligence of Ferguson, the master of the barge, who was their fellow servant.

In considering these questions it becomes necessary to refer to the nature of the proceeding to limit liability which is contemplated by the statute. The statute provides for "appropriate proceedings in any court." It has been held that inasmuch as congress did not invest the circuit courts of the United States with jurisdiction of such cases by a bill in equity, and the state courts have not the requisite jurisdiction, the district courts of the United States, since they have admiralty jurisdiction, are best adapted to distribute the precise relief which the statute provides for. *Norwich Co. v. Wright*, 13 Wall. 104. In *Re Morrison*, 147 U. S. 14, 13 Sup. Ct. 246, it was held that "the proceeding to limit liability is not an action against the vessel and her freight, except when they are surrendered to a trustee, but is an equitable action." In *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 3 Sup. Ct. 379, 617, it was said that the object and scheme of the statute are to prevent a multiplicity of suits. The proceeding, therefore, is a suit in equity, in admiralty, not to subject property to liens, nor to obtain a personal decree against the owners of the property, but to administer the property which has been invested in the venture through which the injury has occurred, and upon which admiralty liens may have attached therefor, and to apportion it among those who might, on account of the injury, have enforced admiralty liens against the property, or have obtained personal judgments against its owner. To accomplish these results, and to avoid the dilemma of inferring that congress has passed a law which is incapable of execution, it must be held that the powers of the admiralty in such equitable proceeding are as extensive, and its remedies are as effective, as are the powers and remedies of a court of chancery, where its jurisdiction is invoked in an equitable proceeding. In *Norwich Co. v. Wright*, above cited, it was said:

"If the shipowner desires the intervention of the court, it will not be sufficient for him simply to ask for a pro rata reduction of the libelants' damages, without in some manner tendering the corresponding pro rata compensation to which other parties, whose claims he sets up against the libelants, are entitled. Otherwise he might reduce the libelants' claim without ever being obliged to respond to the other parties."

Here was announced a principle of equity which by the former decision of this court (19 C. C. A. 436, 73 Fed. 226) was applied to the present case. We there held that the owners and lessees of the Ocklahoma and the Columbia could not limit their liability by

simply surrendering one of the offending vessels, but were required to surrender both, and the cause was remanded for further proceedings in accordance with that view. It is not necessary here to reconsider any of the questions determined on the former appeal. It was held that the court could not proceed without the possession of the fund to which the liability was limited. The cause being remanded for that purpose, what were the necessary steps to be taken? Was the petition to be dismissed, unless the petitioners should, of their own motion, surrender the Ocklahama, or was it proper for the court to retain jurisdiction of the case, since its jurisdiction had once been invoked by the petitioners, and to obtain, by its own process, or upon its own order, the possession of the vessel, which should have been surrendered in the first instance, and which the petitioners still declined to surrender? We have no doubt that the latter proceeding was the proper one. The jurisdiction of the district court, in admiralty, in this equitable proceeding, had been invoked for the purpose of limiting the liability of the petitioners and adjusting all claims. As the result of filing the petition, all proceedings against the vessels and their owners were stayed. The petitioners voluntarily submitted themselves to the jurisdiction of the court, and asked the court to pass upon the question of their limited liability. They set forth the facts out of which that liability arose. They mentioned and described the Ocklahama and her connection with the accident. It is true, they denied that she was liable for the injury; but issue was taken upon this allegation by the appellees Balfour, Guthrie & Co. They alleged that the Ocklahama was liable, and asked the court to bring her in. The court proceeded to adjudge the damages, and to apportion to the payment thereof the small fund which represented the value of the Columbia. When the case went back on the mandate from this court, the Ocklahama was in the possession of the receiver. The appellees applied to the court for an order to make the receiver a party to the suit. This was denied, the court ruling that the receiver was not a necessary party. The petitioners did not ask the court to dismiss the suit or to dissolve the injunction. They were still before the court with their petition, and praying for the relief which the petition asked for. The appellees were in court with their answers, setting up their claims and demanding judgments therefor, denying the right of the petitioners to limit their liability to the barge, and demanding the surrender of the Ocklahama. It would be paying but little regard to the statute, and the decisions which have interpreted it, to say that in this equitable proceeding the court shall not have the power to require the petitioners to do equity. Said Mr. Justice Bradley in *The Benefactor*, 103 U. S. 239, "The flexibility of admiralty proceedings will enable the court, in most cases, to shape their course so as to attain justice between the parties." But for the interference of the court in the equitable proceeding, the appellees in this case would have had their recourse against both the vessels and their owners, and might long since have enforced their claims to the full extent of the damages which they sustained. By appealing to the equitable jurisdiction granted

to the admiralty court, the petitioners have procured a stay of such proceedings. A long period of time has elapsed. The appellees have not now the facility that they then had to produce evidence of the facts. The petitioners have become insolvent. Their assets have been sold upon foreclosure of mortgages. They have nothing now wherewith to meet the demands arising out of the accident. Such an interpretation of the statute renders it nugatory, and deprives the court of the jurisdiction which it was evidently the intention of congress to bestow upon it. Nor is it important here to determine whether, upon the refusal of the petitioners to surrender her, the district court could rightfully obtain jurisdiction of the Ocklahama by virtue of its process, or whether the vessel should have been brought into court by an order of sequestration, or by other means. The fact remains that the Ocklahama was brought into court; that her owner appeared and stipulated to pay her appraised value; that thereby the fund which the court was called upon by the petitioners to administer, in case it should limit their liability, was placed in the possession of the court. The method by which it was obtained, inasmuch as it does not involve any substantial right of the appellants, it is not necessary for the court now to review.

It is insisted that the Oregon Railroad & Navigation Company, the present owner of the Ocklahama, has not had its day in court, and that it is an innocent purchaser of the vessel, and took her upon foreclosure of a mortgage against the property of the Oregon Railway & Navigation Company, without notice of any admiralty lien affecting her. The Oregon Railroad & Navigation Company is the Oregon Railway & Navigation Company reorganized, with its name changed from a "way" to a "road." It has the same property, does business at the same places, is conducted by the same officers, and is represented by the same attorneys. The attorneys who are now before the court on behalf of the appellants were the attorneys for the petitioners at the commencement of the proceeding, and were subsequently the attorneys for the receiver of the Oregon Railway & Navigation Company. Notice to a corporation can only be effected by notice to its officers and agents, and it is absurd to say that the reorganized corporation is a purchaser without notice. It had notice of the accident out of which the present litigation arose, of the participation of the Ocklahama therein, of the lien with which she was chargeable therefor in admiralty, and of the proceedings which were brought to limit that liability. When the Oregon Railroad & Navigation Company appeared in the district court in the proceedings subsequent to the mandate from this court, it attempted to litigate a matter which was already adjudicated, to which its predecessor in interest had been a party, and by which it, as successor, was bound. It acquired the Ocklahama subject to the admiralty lien which had attached to it.

The question whether or not Short and Anderson are barred of all right to recover damages for the death of their intestates by reason of the fact that the accident occurred through the negligence of a fellow servant is one that does not affect the substantial rights of the railroad companies. The total amount of the fund in court is

insufficient to meet the damages which the court has found were sustained by Balfour, Guthrie & Co. If there was error in awarding a portion of it to Short and Anderson, the amount awarded to them should have been paid to Balfour, Guthrie & Co. The disposition of the fund is a matter which does not concern the other parties to the suit. On the first appeal to this court, Balfour, Guthrie & Co., while appealing from the decree, did not appeal from, and sought in no manner to attack, that portion thereof which awarded damages to Short and Anderson. No suggestion was made in the pleadings before the original decree that Short and Anderson were not entitled to recover by reason of the fact that Ferguson, whose negligence caused the accident, was the fellow servant of their intestates. In the proceedings upon the mandate, Balfour, Guthrie & Co. did not file supplemental pleadings making such a defense, nor did they ask leave to do so. After the mandate, no further evidence was taken. Balfour, Guthrie & Co. now appeal, not from the action of the court in fixing the amount which Short and Anderson are to receive, but from the finding that they are entitled to recover in any sum whatever. That question has been adjudicated by the former decree, and we think the question of the right of Short and Anderson to participate in the fund is not now open for consideration. *The Lady Pike*, 96 U. S. 461; *Supervisors v. Kennicott*, 94 U. S. 498; *Sibbald v. U. S.*, 12 Pet. 488; *The Santa Maria*, 10 Wheat. 431; *Roberts v. Cooper*, 20 How. 467. We find no error for which the decree should be reversed. It will therefore be affirmed, with costs to the appellees.

CANTON INS. OFFICE, Limited, v. WOODSIDE et ux.

(Circuit Court of Appeals, Ninth Circuit. October 3, 1898.)

No. 427.

1. MARINE INSURANCE—STIPULATION AGAINST AVERAGE.

Since a policy on "personal effects" should be applied distributively to the various articles, a stipulation therein, "Warranted free from all average," does not exempt the insurer from liability for articles which are totally lost, merely because a few articles of wearing apparel are saved. 84 Fed. 283, affirmed.

2. SAME—CREDIT FOR GOODS SAVED.

Under a policy which applies distributively, the insurer is entitled to credit for the value of articles saved.

3. SAME—AVERAGE CLAUSE—HOW CONSTRUED.

Where a policy issued by an English corporation provides that all claims under it are to be established according to the customs of the English Lloyds, the words of an average clause contained therein are to be understood in the sense given to them by the English law.

4. SAME—EXCEPTIONS.

A stipulation in a policy, which is in the nature of an exception to the liability of the insurer, is construed strictly against him.

5. SAME.

The rule that the written parts of a contract control the printed parts is subject to the rule that words of exception in a policy, if doubtful, are to be construed most strongly against the party for whose benefit they are intended.

Appeal from the District Court of the United States for the Northern District of California.

Andros & Frank, for appellant.

Page, McCutchen & Eels, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This was a suit, brought by the appellees, Alexander Woodside and Isabella Woodside, his wife, against the appellant, Canton Insurance Office, Limited, a corporation organized under the laws of Great Britain, to recover upon a policy of marine insurance. The policy, which was issued by the defendant company at its office in the city of San Francisco, Cal., was dated March 12, 1895, and by it the defendant insured Alexander Woodside in his own name, and for himself and all others interested, in the sum of \$2,000, for the term of one year, upon property described in the policy, as "personal effects belonging to himself and his family, valued at the sum insured." It was provided in the body of the policy (referring to the subject of the insurance): "Warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt;" and in another paragraph, containing the usual warranty that memorandum articles should be free from average, it was provided "that all other goods * * * shall be warranted free from average under three pounds per centum unless general, or the ship be stranded, sunk, or burnt," but on the margin of the face of the policy the following stipulation was written: "Warranted free from all average," without any exception. There was also printed in the margin the following provision: "All claims under this policy to be adjusted according to customs of English Lloyds." The personal effects thus insured consisted of various articles of clothing, silverware, an organ, sewing machine, nautical instruments, charts, etc., belonging to the libelants, and in the steamer Bawnmore, of which the libelant Alexander Woodside was the master. On or about the 28th of August, 1895, the steamer was stranded on the coast of Oregon, and became a total loss, and all of the personal effects belonging to the libelants, and covered by the policy of insurance sued on, were at the same time totally lost by reason of perils insured against by said policy, except one sextant, which was saved in a damaged condition, a few articles of clothing, including the apparel worn by the libelants at the time of the disaster, two pairs of shoes, and a few suits of underclothing. These articles were valued at \$78, including 13 charts, valued at \$3, which appear to have been lost. The effects actually lost were valued at \$4,000. It appears, further, from the pleadings that the libelants, after the loss, duly abandoned to the respondent all of the articles which had been saved as and for a total loss, but that the respondent refused to accept the same. Upon these facts, the court below entered a decree in favor of the libelants for the full amount called for by the policy of insurance, viz. \$2,000, with interest from October 25, 1895, and costs of suit. 84 Fed. 283. It is from this decree that the present appeal is being prosecuted. The as-

signments of error are five in number, and can be said to raise but two questions: (1) Whether the appellees can recover on the policy in question as and for a total loss upon the facts stated; (2) whether the court below should not have made an allowance in favor of the appellant for the sum of \$78, the value of certain articles saved in a more or less damaged condition.

The contention on the part of the appellant is that under a policy of insurance where property is insured as an entirety, and under a single valuation, "free from all average," the underwriter is liable only in the event of the absolute total loss of the entire thing or species; and that, if any part of the property insured be saved in specie, although in a damaged condition, the underwriter is relieved from liability. The application of this rule to the present case would have the extraordinary result of depriving the insured of the benefit of their insurance had they escaped with only the clothing they had on at the time of the wreck. In *Duff v. MacKenzie*, 3 C. B. (N. S.) 16, a similar objection was considered in construing a policy of insurance on "master's effects," valued at £100, "free from all average." Some of the goods thus insured were totally lost by the perils insured against, but others were saved. It was contended on the part of the plaintiff that he was entitled to recover in respect of the goods which had been lost as and for a total loss of each article. On the part of the defendant it was answered that he was exempted by the average memorandum, because the loss was only a partial loss of the subject insured. In commenting upon this strict construction contended for by the defendant the court said:

It "leads to the very harsh and absurd consequence that, if the assured happens to be successful in rescuing any portion of the articles insured—even the clothes he may be wearing—from the perils of the sea, he will thereby incur the penalty of forfeiting his insurance on the rest, though they are all totally lost. This result is so startling that we find it impossible to believe the parties could have intended it. And it may be added that the contract, so construed, would be quite at variance with the object for which, as it is well known, the memorandum as to average was introduced into policies, viz. that since it may be difficult to ascertain the true cause of the damage which goods of certain kinds, such as those usually specified in the memorandum, receive in the course of a voyage,—whether it arose from the nature of the articles themselves, or from the perils insured against,—the insurers thereby expressly provide that, as to some kinds of goods, they will not be answerable for any average or partial loss, and, as to others, that they will not be liable for such loss not amounting to a certain percentage on the goods."

To maintain the rule and avoid its harshness when applied to an insurance on personal effects, counsel for appellants contends that the court will give a reasonable construction to the contract, and determine that the libelants are not entitled to recover under the policy if any part of the subject of the insurance "other than such parts thereof as might be actually in use and on their persons at the time of the loss," was saved in specie, though in a damaged condition. Where the strict construction of the language of a contract will lead to such an unjust or absurd result that it may be said that it was not within the reasonable contemplation of the

parties to the contract, the court will avoid such a construction, and endeavor to ascertain the real intention of the parties, which, in a case of insurance having indemnity for its object, will be construed liberally to that end. The rule contended for by the appellant falls short of this requirement, since it does not have in view the protection of the insured against the loss they have sustained. Moreover, the purpose of indemnity will not be defeated by setting up a condition in the policy which was probably inserted as applying to other subjects of insurance, and the reason and object of which do not appear to apply to the particular contract. *Beach, Ins. § 607.* A better rule, and one more in harmony with the principles governing the subject, would be to read the contract in the light of surrounding circumstances, and to ascertain whether or not the contract of insurance was intended to be entire or severable; for, if it be determined that the contract was entire, the stipulation contained in the memorandum clause, "Warranted free from all average," would prevent the insured from recovering anything because of the fact that there was not an absolute total loss. On the other hand, if it be determined that the contract was intended to be severable,—that is, in the sense that each article was separately insured, and that the memorandum clause, "Warranted free from all average," applied to each article separately, and not to the articles insured as an entire lot,—it is plain that the insured would be entitled to recover. The determination of this question rests largely upon the meaning of the expression in the policy, "personal effects." It will be observed that the articles or effects insured by the appellees were not specifically enumerated in the policy. To do so would have been inconvenient because of the number and variety of articles insured. It was not desirable nor necessary to enumerate them, provided the expression "personal effects" conveyed the idea that they were insured separately, although not described more particularly. The evidence is uncontroverted that the "personal effects" insured consisted of separate and distinct articles. It is a well-settled rule of the construction of contracts that, "where the agreement embraces a number of distinct subjects, which admit of being separately executed and closed, it must be taken distributively, each subject being considered as forming the matter of a separate agreement after it is so closed." *Perkins v. Hart*, 11 Wheat. 237. In the case of *Duff v. MacKenzie*, *supra*, an expression similar to that used in the case at bar was held to have the effect of rendering the contract severable. The court said:

"The articles which constitute the 'master's effects' have no natural or artificial connection with each other, but, of necessity, must be essentially different in their nature and kind, in their value, in the use to be made of them, and the mode in which they would be disposed on board. The word 'effects' is obviously employed to save the task of enumerating the nautical instruments, the chronometer, the clothes, books, furniture, etc., of which they happened to consist. And, although it is stipulated by the warranty that these effects shall be free of all average,—or, in other words, that the insurer shall not be liable for any amount of sea damage to them short of a total loss,—we think, looking at the nature of the subject of insurance, and the terms of this exemption, it is doing no violence to the language used to hold that he is not to be exempted from liability for a total loss of any of the articles of which the 'effects' consist. Suppose, instead of the

general description of 'master's effects' the body of the policy had enumerated them, and then the memorandum had said, 'the chronometer, the sextant, the hat, and the great coat above mentioned, to be free from average,' etc.; might not this be well understood to mean that the insurer was not to be liable for any partial damage, but was to be liable for any total loss of any of the specific things mentioned in the memorandum? And, if so, we do not feel constrained to hold that the intention of the parties is different, and the subject of insurance one indivisible subject, merely because the description in the policy of the articles insured is general, and the memorandum extends to the whole subject of the insurance."

It was accordingly held that the insured was entitled to recover in respect to the articles totally lost. In *Wilkinson v. Hyde*, 3 C. B. (N. S.) 30, the policy was "on goods," valued at £240, and was against "total loss only." Under this policy, the plaintiff shipped a number of cases and packages of miscellaneous goods, apparently the equipment of an emigrant. The vessel was wrecked, and all the goods were lost, with the exception of a case of circular saws and a case of window glass, and the question was whether there was a total loss of the packages which were actually lost, or an average loss only. It was held, on the authority of *Duff v. MacKenzie*, that the insured was entitled to recover in respect of the packages so totally lost. These two cases appear to declare the English doctrine in the construction of the words of the contract now under consideration, and, while a contract of insurance, like any other contract, is to be construed according to the law and usages of the place where it is to be performed, or, if a place of performance is not indicated, then according to the law and usages of the place where it is made, still, the insurer in the present case being an English corporation, and it having been provided in the policy that all claims under it are to be established according to the customs of the English Lloyds, it may be presumed that the words in the average clause of the contract were used in the sense in which they were understood in the English law. *London Assurance v. Companhia De Moagens Do Barriero*, 28 U. S. App. 439, 15 C. C. A. 379, and 68 Fed. 247.

The American cases cited by counsel for appellant are, however, not necessarily inconsistent or in conflict with these two cases. They appear to be clearly distinguishable, either on the ground that the indemnity claimed by the insured was for the loss of memorandum articles which were only partially lost, so that there was not a total loss of a specific enumerated article, or the policy provided in clear and unambiguous language that the insurer would not be liable unless there was an absolute total loss of all the articles insured. In the case at bar the intention of the parties is not expressed as clearly as it might be, and hence any doubt that there may be is to be resolved in favor of the insured and against the insurer. A policy of insurance is a contract of indemnity, and is to be liberally construed in favor of the insured. *Yeaton v. Fry*, 5 Cranch, 335; *National Bank v. Insurance Co.*, 95 U. S. 673, 679; *Steel v. Insurance Co.*, 2 C. C. A. 463, 51 Fed. 715, 723, and cases there cited; 1 Arn. Ins. (6th Ed.) 295. If the policy will fairly admit of two constructions, that one should be adopted which will

indemnify the insured. *Grace v. Insurance Co.*, 109 U. S. 282, 3 Sup. Ct. 207; *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360; *Burkheiser v. Association*, 10 C. C. A. 94, 61 Fed. 816. Furthermore, the memorandum clause, "Warranted free from all average," is considered in the nature of an exception to the liability of the insurer, and is construed strictly against him. 1 Duer, *Ins.* par. 6, p. 161; *Blackett v. Assurance Co.*, 2 Crompt. & J. 244.

It will further be observed that in the present case the average clause in the body of the policy contained the exception, "unless the vessel or craft be stranded, sunk, or burnt." The vessel was stranded, and became a total loss, and, under the exception, the insured was entitled to be indemnified by the insurer for a partial loss of the subject of insurance. But the written stipulation on the margin of the face of the policy, "Warranted free from all average," without the usual exception, "unless the vessel be stranded, sunk, or burnt," enables the defendant to raise the question of its liability for a loss that is short of a total loss. These inconsistent stipulations in a policy of insurance may not be a fraud upon the insured, but they are certainly lacking in clearness and certainty; and the rule that the written parts of a contract control the printed parts is, in our judgment, subject to the rule that words of exception in a policy, if doubtful, are to be construed most strongly against the party for whose benefit they are intended. *Palmer v. Insurance Co.*, 1 Story, 360, Fed. Cas. No. 10,698; *Donnell v. Insurance Co.*, 2 Sumn. 380, 381, Fed. Cas. No. 3,987; *Yeaton v. Fry*, 5 Cranch, 335. From whatever point of view the question is regarded, we think this contract should be construed in favor of indemnity for the loss sustained by the insured.

With respect to the second question, it is contended that the court below should have made an allowance in favor of the defendant in the sum of \$78 for the articles which were saved in a more or less damaged condition. Having determined that the contract of insurance should be applied distributively to the different articles insured, it follows that the value of the articles saved must be deducted from the total insured value of the personal effects. It appears that in the list of personal effects saved the master, by mistake, entered 13 charts, valued at \$3, as having been saved. The charts saved belonged to the vessel. The charts belonging to the master, and constituting a part of his personal effects, were, in fact, totally lost. The articles saved in specie were, therefore, of the value of \$75, and this amount should be credited to the insurer. The decree of the district court will therefore be modified to this extent, and, as so modified, it is affirmed.

THE MARY A. TROOP.

(District Court, D. Washington, N. D. October 17, 1898.)

ADMIRALTY—LIBEL FOR WAGES—WEIGHT OF EVIDENCE.

Where there is a direct conflict of evidence between the witnesses for a libelant suing for wages and the captain, the fact that there was another witness, who knew the facts in dispute, and apparently might have been examined by the claimant, will determine the issue in favor of the libelant.

P. P. Carroll, for libelant.

W. H. Gorham, for respondent.

HANFORD, District Judge. This is a suit in rem to recover mariner's wages. The answer admits the contract and services as alleged in the libel, but charges the libelant with desertion. The evidence shows that the libelant did leave the service of the vessel without completing the term for which he was hired, and without the captain's consent. The question in the case is whether the libelant, while in the service of the vessel, was subjected to such ill treatment at the hands of the master as to justify him in leaving the ship. The evidence is contradictory, and it is extremely difficult to reach a satisfactory conclusion. The testimony of the libelant and that of three of his shipmates is to the effect that during the voyage the captain used abusive language, and that he made violent assaults upon different members of the crew without any cause or necessity, and that the food and water furnished to the crew were insufficient in quantity, and much of it was spoiled, being maggoty and decayed, and unfit for use as food by human beings, and that complaints regarding the food were made to the captain, but were without result, except that after the complaints the men fared worse. This is all positively denied by the captain, who is the only witness called in behalf of the claimant. I do not feel convinced beyond a reasonable doubt that the story of hardship told by these sailors is true, but I must give their testimony due weight, and decide according to the preponderance. If their evidence is entirely false, as the captain has sworn, there is at least a probability that other evidence to corroborate the testimony of the captain could easily have been introduced. Evidence given on the part of the libelant shows that the cook, who knew all about the quantity and quality of the food served to the crew during the voyage, was still in the ship, and under the captain's control, at the time the depositions were taken. If for any reason his testimony could not be produced, some explanation of that fact should have been offered. In summing up I find that the libelant has supported his allegations by the testimony of three witnesses besides himself, who are unimpeached, except that they are contradicted by the testimony of the claimant, who has offered no corroborating evidence, and appears to have failed to call an important witness whom he could easily have produced. I therefore award to the libelant wages at the rate of \$17.50 per month from the 22d day of December, 1897, to the 7th day of July, 1898, less \$25.50; being the amount which the

libelant admits to have received in advance wages and goods from the slop chest. The captain's testimony is that the slop-chest account amounted to about \$30; but he should have taken the pains to have stated the account accurately, because it was his business to keep a true account, and when called upon he should have furnished an accurate statement of what he claimed was due the ship from the libelant. Having failed in this, I can allow only the amount which the libelant admits.

THE LENNOX.

(District Court, S. D. New York. November 12, 1898.)

BILL OF LADING—EXCEPTION OF BREAKAGE—FIRECRACKERS — BURDEN OF PROOF.

On landing a consignment of 500 packages of firecrackers from Hong Kong, most of the boxes containing the firecrackers inside of the packages were more or less broken. The bill of lading excepted "insufficiency of packages, wear and tear and breakage." Upon proof by the vessel of good stowage, no shifting of cargo and careful handling, and no definite cause of the injury appearing, but the boxes being frail in appearance, with the tops and sides where the breakage occurred much thinner than the ends and bottom: *held* (1) that the damage came within the exception of breakage; (2) that under this exception the shipper took the risk of breakage from whatever cause, unless the ship's negligence was shown by affirmative proof to have caused the damage; no such proof appearing, the libel was dismissed.

This was a libel in rem by Edgar J. Hesslein and others against the steamship *Lennox*, to recover for damage to cargo.

Cowen, Wing, Putnam & Burlingham, for libelants.

Convers & Kirlin, for claimant.

BROWN, District Judge. The above libel was filed to recover the alleged damages of \$1,500 to a consignment of 500 packages of firecrackers, shipped at Hong Kong, in September, 1897, and delivered at New York in the following November. Each package consisted of 8 boxes of firecrackers, which were put up together and inclosed in a cover of matting. Each box contained 36 bunches of small firecrackers. The damage consisted wholly in the breakage of the boxes. The bunches of crackers within the boxes were not injured or even stained. Such articles, however, are not in merchantable condition, except in boxes. The bill of lading exempted the vessel from liability among other things for "insufficient packing, reasonable wear and tear of packages, leakage, breakage," etc. The boxes were of wood and frail in texture, the top being very thin and the two sides thinner than the bottom or ends. The breakage was mostly of the top or of the sides of the boxes. The libel charges that the breakage of the boxes arose through the "negligence of the steamship and their failure in proper loading, stowage, custody, care and proper delivery thereof"; and that "through the negligence of the steamship the boxes with the matting covers were so badly broken that the merchandise was unfit for re-export and could not be put in proper ship-

ping order." The answer sets up the above exceptions in the bill of lading, and denies any negligence on the part of the ship.

There is abundant proof on the part of the ship of good stowage, proper loading and discharge, and careful handling; that the ship met some stormy weather upon the voyage and several gales, with considerable rolling and pitching; but in this regard the voyage was not extraordinary. The result of all the evidence is that there is no proof as to the precise cause of the breaking of the boxes. The first officer who had had considerable experience in transporting such goods says that these boxes were considerably lighter than usual. Mr. Armstrong, a witness called by the libelants says the boxes were of the usual description. As no test, however, was applied by the latter witness as regards the comparative strength of these boxes and others, I must assume that his testimony was based upon the general appearance of the boxes, rather than from any test of their quality and strength.

Where a loss arises from one of the excepted perils, the ship is *prima facie* excused, and she can only be held liable upon affirmative proof that some negligence on her part was the efficient cause of the loss. *Clark v. Barnwell*, 12 How. 272; *The Pereire*, 8 Ben. 301, 303, Fed. Cas. No. 10,979; *The Invincible*, 1 Low. 225, Fed. Cas. No. 7,055; *The Hindoustan*, 14 C. C. A. 650, 67 Fed. 794; *The America*, 59 Fed. 787; *The Flintshire*, 69 Fed. 471. In such cases, therefore, the ship stands discharged, unless there is a preponderance of proof convicting her of negligence. If the cause of the injury is left in doubt, the ship stands excused for the reason that by virtue of the exceptions in the bill of lading the shipper in effect contracts that he will himself stand the risk of any loss arising from the cause named. In the present case the shipper in effect contracted that he would stand the risk of injury to the goods from insufficiency of packages, from ordinary wear and tear, or from breakage. Taking all the circumstances into account, the frail appearance of the boxes themselves and the kind and places of the breakage; the fact that the breakage was very general and not confined to a few packages; the absence of any indications of neglect on the part of the ship, and the testimony to the contrary, the probability appears to me to be strong that the real cause of the loss was that the boxes were of inferior material and unfit for the voyage, or that the sides and top were too thin. Inequality in the strength of cases apparently similar is quite possible, as was proved in the case of *Linklater v. Howell*, 88 Fed. 527. But whether this surmise is correct or not, there is nothing that amounts to affirmative proof of negligence by the ship, and the ship therefore stands excused, because the risk of injury by breakage was assumed by the shipper, and it has not been proved to have arisen through the ship's fault.

Conversely, where the loss is not by an excepted peril, the carrier takes the risk of explaining the cause of the damage and of proving it to be a sea peril. It is insufficient for him to negative certain causes of loss; if on the whole the damage is unexplained, the ship in such case remains liable, because she has taken that risk. *The Mascotte*, 48 Fed. 119, affirmed 2 C. C. A. 399, 51 Fed. 605. In the converse

situation, as in this case, the shipper having assumed the risk of the excepted causes, the same rule must be applied to him.

The libelants contend that the case does not fall within the exception of "breakage"; but that if the defendant's contention is correct, the cause of injury would be "insufficiency of packages," under which the burden of proof would rest upon the defendant. I do not think it necessary to consider the latter part of this contention, as I think the case falls properly within the exception of breakage. It is not essential to prove that the bunches of firecrackers were themselves broken. If that was the test of liability the proof would show that there was no damage at all, and hence no cause of action, since the bunches of crackers were not injured. It is only because the packages as a whole, and the boxes in the packages, were so broken that they could not be re-conditioned, and made marketable in the usual markets, that damages are sustained. The complaint itself specifically charges the breaking of the boxes within the matting covers, through the ship's negligence, as the cause of action. It is this breakage of the boxes that makes the packages unmarketable. The bill of lading does not treat the goods as bunches of firecrackers; the goods are shipped as 500 packages, and the damage consists in the injury to the packages as such, namely, by more or less breaking of the matting, and of the boxes within, the former of which could be mostly re-conditioned, but not the latter. The boxes are an essential part of the merchantable condition both of the packages and of the crackers; and I can have no doubt that breakage of the boxes is within the exception. It not being shown that the breakage arose through the negligence of the ship, the libel must be dismissed.

RUGER et al. v. FIREMEN'S FUND INS. CO.

(District Court, S. D. New York. November 11, 1898.)

MARINE INSURANCE—COMMISSIONS ON CHARTER—CANCELING CLAUSE—NEGLIGENCE.

A shipping broker, on November 18th, insured his commissions of \$250 for obtaining a charter for the ship F., which was to proceed from London to Newport News and there load, with an option to the charterer to cancel if the vessel did not arrive by February 15th. On insuring no reference or inquiry was made as to a cancellation clause; but the defendant was in the habit of making such insurances, and by present usage such charters usually contain a cancellation clause. The vessel after remaining a month in London, while anchored in the Thames was injured by collision, and three weeks afterwards by a second collision. The injuries were not large and might have been repaired in time to reach Newport News within the charter period. No attempt was made to prepare her for the voyage, but the master remained in London to prosecute suits for the collisions and in April went to Bremerhaven, the home port, and repaired for about \$1,500. *Held* (1) that the defendants presumptively had knowledge of the current usage to insert in such charters a time and cancellation clause, and were presumed to insure against sea perils for the contemplated voyage to be made within the charter period, and not for a later voyage which would frustrate the purpose of the charter and would be commercially a different voyage from that contemplated in the charter or the policy; but (2) that the facts indicated the negligence of the ship in not repairing

earlier to Newport News, or attempting to make repairs to go there, as the proximate cause of the loss of the charter rather than sea perils; and that such negligence was not within the policy.

Cowen, Wing, Putnam & Burlingham, for libellant.

Butler, Notman, Joline & Mynderse and F. M. Brown, for respondent.

BROWN, District Judge. The above libel was filed to recover the commissions of a ship broker in obtaining a charter for the sailing ship Theodor Fischer, the commissions amounting to \$250 having been insured by the defendant against loss by sea perils. The charter was dated November 17, 1896, and provided that the ship, being then in London, should repair to Newport News and there take on cargo, and that in case the vessel did not arrive at Newport News on or about February 15, 1897, the charterer should have the option of canceling or maintaining the charter. The ship had arrived in London on November 12th and discharged her cargo there afterwards. On December 12, 1896, while moored at the Greenwich buoys in ballast, she was damaged by collision with the steamship Trevarrock and beached. Some temporary repairs were made, and the master continued in London for the purpose of bringing suit against the Trevarrock. The suit was tried in April or May following. About the 1st of January while moored at the Deptford buoys she was run into by the Corsair, for which she recovered £150. The master says an estimate was made of the damage by the first collision, at £1,736, and by the second collision at £836. But this damage is not proved by any competent evidence, and the actual cost of repair at Bremerhaven was about \$1,500. For greater economy in repairing there, and in order to prosecute the suits in London, the ship not being in condition then to be taken to Hamburg in winter, she remained in London until spring. On the 15th of February, the vessel not having arrived at Newport News, the charterer canceled the charter pursuant to its terms. The respondents contend that the plaintiff's loss of commissions was not through sea perils within the terms of the policy, but from the voluntary acts of the parties; namely, the acts of the owners in not repairing the ship in London, as might have been done, and in the voluntary canceling of the charter by the charterer. In July following the ship arrived in New York and was rechartered.

The insurance was effected without the issuing of a full policy of insurance, but by means of an acceptance of a written application. This application was made on the day following the signing of the charter, requesting "insurance of \$250 on commissions on charter. Free of all average. Policy proof of interest. Valued at ———. Shipped on board ship Theodor Fischer. And to be insured at and from London to Newport News. Covering after arrival until vessel clears outward." A premium of 3 per cent. amounting to \$7.50 was paid. In this application nothing was said in regard to the cancellation clause in the charter, nor was there any inquiry made by the insurers on that subject. In charter parties however such can-

cancellation clauses are now usually inserted. Upon the acceptance of such applications, the testimony shows without doubt that the understanding is that the risks assumed by the insurers are the same as are assumed under the regular office policy. This covers sea perils, but does not cover delays, or mere damages for delay upon the voyage, not arising out of sea perils.

1. The subject of insurance in this case was the libelant's commissions, not the vessel. The printed form of the application makes its terms somewhat incongruous, as in the clause "shipped on board ship Theodor Fischer." The phrase "free of average," is not incompatible with an insurance of commissions, as sometimes only a part of the expected cargo might be loaded in consequence of sea perils. But if that phrase also were wholly incongruous, it could not change the subject insured from commissions to the vessel itself, contrary to the express language of the application and acceptance. The libelant had no interest in the vessel, while the commissions were wholly his. But as the commissions could only be earned by the loading of the ship at Newport News after a voyage from London, the libelant was interested in the completion of that voyage, that is, a voyage within the charter period, by which commissions might be earned; and the meaning of the insurance, in my judgment, is, that the ship should not be prevented by sea perils from making that voyage according to the terms of the charter and within the time fixed by the charter that was expressly referred to in the application, and which by current usage, defendant presumably knew to have a cancellation clause. Time is often essential in a mercantile adventure; and where there is a time condition, delay in entering upon a voyage beyond the time fixed, which would frustrate its purpose, would make it practically and commercially a different voyage or adventure from the one intended and contemplated, either in the charter, or in the policy. *Jackson v. Insurance Co.*, L. R. 10 C. P. 125; *Bensaude v. Insurance Co.* [1897] 1 Q. B. 29, affirmed [1897] App. Cas. 609. In insuring therefore, upon a voyage agreed by charter to be made within fixed time limits, I think the insurers are bound by all the terms of the charter relating to the charterer's option in reference to the contemplated voyage, in so far as the ship's performance of the voyage contemplated is prevented by sea perils, unless excepted in the contract of insurance. The evidence shows that applications like the present are very common; that the defendant company often issued such insurance, and that the cancellation clause is now usual in charters; and the defendant must be presumed to be aware of it, contrary to the circumstances in *Mercantile Steamship Co. v. Tyser*, 7 Q. B. Div. 73. Had the defendants any wish to except themselves from the limitations of a cancellation clause, they were put upon inquiry by the reference to the charter in the application. See *Gow*, *Marine Ins.* p. 166.

It is unnecessary to consider the question as to the right of a charterer to cancel a charter for delay of the vessel in reaching her port of loading, where the charter contains no provision on this subject. A time limit fixed in the charter itself supersedes the need of any such inquiry. Such a limitation is presumptively an agreement by

the parties themselves that the purpose of the contract would be frustrated, or might be frustrated, by the vessel's delay in arrival beyond the time named, and if there should be any doubt on the subject, leaving the charterer to determine by the exercise of the option given him. When such an option is exercised in good faith, that ends the scope of the charter as respects the identity of the adventure or voyage. The possibility that a similar voyage may or might be made later, does not make it the same voyage or the voyage contemplated, either in the charter or in the contract of insurance. If, therefore, in the present case, the two collisions suffered in London, while the vessel was there, ought to be considered as the real and proximate cause of the failure of the vessel to arrive at Newport News by February 15th, inasmuch as those collisions were sea perils and defeated the voyage contemplated, I think the loss of the commissions should be deemed to be within the risks assumed by the defendant. In re Jamieson [1895] 2 Q. B. 90.

2. I am not satisfied, however, that those collisions ought to be considered as the true or proximate cause of the ship's failure to arrive at Newport News on February 15th. The vessel, as above stated, had arrived in London on the 12th of November. The first collision was not until the 12th of December. At that time she was unloaded, and was lying in the stream in ballast, and no reason appears why she had not already set sail for Newport News, as required by the charter.

3. The statement of the master that the damages caused by the two collisions, one on the 12th of December and the other about the 1st of January, were estimated respectively at £1,736 and £836, and were greater than the value of the vessel repaired, is entitled to no credit, in the absence of any testimony as to the cost of repair in England, and in view of his testimony that the repair of those damages subsequently made in Bremerhaven amounted to less than 6,000 marks or \$1,500, making the vessel, after some other small outlay, worth from \$10,000 to \$12,000. After the first collision, no attempt was made to put the ship in condition to go to Newport News, and no legal excuse is given for not doing so. The master remained in London for the purpose of prosecuting the Trevarrock, in which he was finally defeated, on the ground that the Trevarrock was in charge of a pilot. For the second collision £150 damages were recovered, about half the whole subsequent cost of repair. No attempt at repair in London was made, it is said, because repairs could be procured cheaper at Bremerhaven; and so the ship remained in London for nearly four months. The conclusion seems to me unavoidable, that the ship failed to reach Newport News at the appointed time through negligently postponing her start from London, and through failure after the first collision to make any effort to repair for the purpose of fulfilling her charter obligations. Any such negligence, or the voluntary choice of the master or owners after a collision to abandon the charter and make no endeavor to fulfill it, though they might do so, simply because they may regard it as more to their interest to remain in port and prosecute suits, or to go to a different commercial country

for cheaper repairs, is not a sea peril, nor the necessary or natural consequence of a sea peril, and not therefore one of the risks assumed by the policy; and on that ground the libel, I think, must be dismissed.

THE GATE CITY.

(District Court, E. D. New York. May 27, 1898.)

1. COLLISION—STEAMER AND SAIL—SCHOONER'S LIGHTS—PRESUMPTIONS.

That the lights of a schooner were not seen by an approaching steamer; that it may have been possible for the schooner's fore staysail to swing so far to port as to obscure her port light; and that this position would, in the condition of the wind, have best aided her progress,—is not sufficient to raise a presumption that such was its position, as against the positive testimony of her master that it was trimmed flat, aided by the presumption that the schooner would not so adjust her sails as to hide her lights.

2. SAME—CHANGE OF COURSE BY SAILING VESSEL.

The rule requiring a sailing vessel meeting a steamer to hold her course is a broad and general one, intended to put the burden of avoiding a collision upon the steamer; and, if the sailing vessel departs from the injunction, the burden is on her to show some reasonable excuse therefor. A disregard of the rule, not demanded by a clearly existing exigency, should not be excused. Therefore she will not be held in fault for adhering to her course, although the steamer seems to be maneuvering in an uncertain and dangerous way.

3. SAME—NEGLIGENCE OF STEAMER.

A steamer colliding with a schooner on the open sea at night held solely in fault for failing to observe the schooner's lights, and for leaving a course which would have carried them well clear port to port, and going across the schooner's bow, the latter having kept her course until in extremis.

This was a libel in rem by John W. Hall against the steamship Gate City to recover damages caused by a collision between her and libellant's schooner, Joel Cook. The New England & Savannah Steamship Company filed a libel in personam against libellant, to recover for damages suffered by the Gate City.

Wilcox, Adams & Green, for John W. Hall.
Seward, Guthrie & Steele, for the Gate City.

THOMAS, District Judge. On the 3d of September, 1897, the steamship Gate City, one of a regular line of steamers plying between Savannah, Ga., and New York, and carrying freight and passengers, was on her north-bound trip from Savannah, and at 2 o'clock a. m. was about off Egg Harbor Light, on the coast of New Jersey. The schooner Joel Cook had sailed from New York on the 2d of September, at about 1 o'clock p. m., bound for Lewes, Del., and at 2 o'clock in the morning of September 3d was headed S. W. by S. $\frac{1}{2}$ S., with the wind N. W. About 5 or 10 minutes past 2 o'clock in the morning, the two vessels collided, the schooner striking the steamer on the starboard side, abaft amidships. The steamer was seriously injured, and the schooner also received substantial injury. The night was dark,

but clear. The schooner was carrying all sails, and, as her master testified, the head sails were trimmed flat, and not changed up to the time of the collision. The steamer's course was N. E. by N. $\frac{1}{2}$ N., which was changed to N. N. E. while she was yet several miles from the schooner. The schooner's course was S. W. by S. $\frac{1}{2}$ S. When the steamer was seen by those on the schooner, the former was from half a point to a point off the schooner's port bow. Had these courses been maintained, the vessels would have passed each other port to port, at an interval of about half to three-quarters of a mile. Those in charge of the schooner saw the steamer's red light when the latter was three or four miles away, and such light was alone seen until the steamer was about half a mile from the schooner, when the master of the schooner saw what her captain described as a ray of the steamer's green light. When this interval was reduced to about 300 feet, as the captain of the schooner testified, the steamer suddenly showed her green light, which resulted from the steamer's starboarding, and shortly thereafter hard a-starboarding. Thereupon the schooner ported, but the collision at this time was inevitable. The evidence on the part of the steamer was to the effect that those in charge of her saw no lights whatever on the schooner before the accident, at the time of the accident, or thereafter. About half a mile to a mile on the starboard side of the schooner was a long tow, showing the usual lights, pursuing a course opposite to that of the schooner; and the courses of the tow, the schooner, and the steamer were substantially parallel. The further essential facts are stated below.

The first point to be considered is whether the schooner was carrying proper lights, and whether persons in charge of the steamer, using proper care, could have seen them. Several persons, including the master, connected with the schooner, testified that such lights had been prepared, put in place, and that they were burning through the night, and that, owing to the confusion and condition of the schooner after the collision, the lights were not removed until after 8 o'clock next morning. Applying the usual rules as to probabilities, as to the opportunities of these persons to know the fact, and to the preference accorded to the evidence of such persons, provided it be otherwise credible, it must be concluded that such lights did exist, and that they were properly placed. In this connection it may be said that the nice unanimity of these witnesses, the particularization of the care stated to have been used by them to know that the lights existed, indicate very great solicitude on the part of the schooner's crew as to the lights, and remarkable observation of the same, or that they exaggerated the extent of their diligence and painstaking concerning the matter. Should the latter alternative be adopted, the court does not consider that such exaggeration is sufficient to justify a finding that the lights did not properly exist. The proof in this regard is not overcome by the evidence of those upon the steamer, to the effect that there were no lights on the schooner. There was a long and well-lighted tow on the starboard side of the schooner. The steamer, with its usual lights and cabin lights, for some time had been in full view; and it is not easily conceivable, under the circumstances, and with the

knowledge that the coast was a pathway for ships, that the schooner would have neglected, not only the commands of the law, but also the requirements of prudent navigation. Those on the steamer had just come on watch. The lookout, the man at the wheel, and the first mate had taken up their duties but a few minutes before. Their opportunities for observation had been brief. They were attracted, probably not entirely, to the tow, which they were passing. Individually, the witnesses for the steamer do not impress the court, either on account of intelligence, correctness of observation in other particulars, or superior manifestations of veracity, as entitled to preference regarding this fact in issue. The counsel for the steamer does not accept their evidence for the purpose of working out his theory of the collision. While not condemning either their purpose to state the truth, or abandoning their evidence in all particulars, he seeks to solve the cause of the accident upon grounds which are skillfully selected, and which, although not finally adopted by the court, have received thorough consideration.

It is urged that, admitting for the argument that the schooner's lights existed, yet that, as the schooner claims that the steamer was approaching the schooner on the latter's port bow, the port light was hid by the fore staysail, which swung so far to port as to hide such light; and measurements and drawings are submitted to show the possibility of this alleged fact. The measurements of the boom, of the sail, of the location of light, of the width of the ship, are not accurate measurements, but are gathered from some general estimate given by the master of the schooner. They seem to show with sufficient clearness that it was possible to swing the sail so far to port as to conceal the port light. Granting this possibility, did that condition exist? The schooner's course was S. W. by S. $\frac{1}{2}$ S. The wind was N. N. W. The advocate for the steamer states:

"The schooner was running free on the starboard tack, with the wind on the starboard quarter, and the booms all out to port. The steamer was not more than half a point to a point on the schooner's port bow; that is, nearly dead ahead. The schooner was light, had all sails set, including four head sails, and the wind was blowing an eight-knot breeze. Under these circumstances, she must have heeled over to port considerably."

The argument then continues to illustrate that under such circumstances, and with the measurements claimed to be approximately correct, the port light was probably concealed. The theory thus adopted by the steamer would concede all the essential positions of the schooner save one, and that is the position of the fore staysail. The master of the schooner states that it was and had been trimmed flat. The counsel for the steamer claims that it swung away to port. For this latter claim there is no evidence, and the court is asked to make the assumption that such was the case (1) because the wind, blowing as it did, would best aid the sailing of the vessel with the sail thus placed; (2) because such assumption that the sail was free, and swung well to port, would account for the failure of those on the steamer to see the schooner's lights.

If the master of the schooner had stated that his sails were set, and

had for some time been set, so as to add nothing to the speed of the ship, or to diminish her speed, and no explanation was given, it might be concluded that they were set so as to catch the wind and aid the sailing. But in the present case the sails, if set, as claimed by the master, would facilitate the sailing, although perhaps not to the same extent as if carried in a position further to port. This presumption, which the court is asked to accept, that the schooner would so adapt her sails as to obtain the highest sailing power, is confronted by the presumption that the schooner would not adjust her sails so as to obscure her light, upon whose appearance her own safety and the safety of other vessels might depend. The presumption of fact thus argued is met by the contrary testimony of the master, and by another presumption, at least equally strong.

As to the other proposition, that an adoption of the theory would harmonize the evidence, and account for the failure of the steamer's crew to see the schooner, the argument is this: (1) There were lights on the schooner. (2) The steamer's crew did not see the lights, and declared that she carried none. (3) This could be accounted for by assuming that the fore staysail was swung so far to port as to conceal the port light. This argument is that, rather than conclude that the watch of the steamer did not use due care, it is to be assumed that the schooner neglected her duty, and exposed herself and others to danger by hiding her lights, and that such assumption should be preferred to the direct evidence that such was not the condition of the sail. However well this theory delivers the steamer's crew from an appearance of transgression at the time of the accident and upon the witness stand, it involves the schooner's crew in a like transgression on both occasions. It is a mere theory, unsupported by a single item of substantial evidence, and disputes evidence which at least has the merit of being in existence. Moreover, while this theory would account for the failure of the steamer's crew to see the port light, it does not account for the failure of the steamer's watch to discover the schooner's starboard light. They saw no light on the schooner at any place or at any time, before the accident, at the time of the accident, or after the accident. They were in a position at some time to have seen her green light, but no one of the steamer's watch, consisting of the captain, mate, pilot, and lookout, admits that he did see it, and several of them testified that it was not there. Disregarding, for this question, the evidence of the mate of the steamer, that the schooner was so related to his ship that he would have seen the former's green light if there had been one, yet there was a time just before the collision when the green light would have been in full view, and bearing down full upon him. It is suggested that, in the peril of the moment, it was overlooked. But it is precisely the incident that should have been noticed at such a time, because it was a signal of the approaching peril. Moreover, the schooner was struck, pulled around to windward, so that at some time the steamer was placed in every favorable position to see both lights; and yet at all times those in charge of the steamer claimed that they did not discover the slightest evidence of any lights. If, now, the lights existed,

the failure of the steamer to see them is not accounted for by an assumption, unsupported by evidence, that the fore staysail might have obscured the port light.

The remaining fault urged against the schooner is that it did not use due care to avoid the result of the steamer's negligence, in case that should be found to exist. That those in charge of the steamer were negligent results from the view already expressed. The steamer, when first seen by the schooner, was headed N. E. by N. $\frac{1}{2}$ N.; and later, while yet at some distance away from the schooner, the steamer was headed N. N. E., and was half a point off the schooner's port bow. The schooner at this time was headed S. W. by S. $\frac{1}{2}$ S. Had these courses been maintained, the vessels would have passed each other on the port side, and no accident would have happened. Those in charge of the steamer state that they saw the schooner off their starboard bow, but evidently this was only later, and when the vessels were quite near to each other. Under these circumstances, the steamer changed its course to one directly across the bows of the schooner, which kept its course. The rule required the steamer to avoid the schooner; but, instead of doing so, she placed herself directly in the schooner's path. No fact appears tending to mitigate her fault. Her crew seek to explain this by saying that the schooner was on the steamer's starboard bow when first seen; that the steamer was at once starboarded; then very shortly afterwards hard a-starboarded; and then, when the collision was at hand, ported to swing the steamer's stern to the starboard of the schooner, and thereby clear the schooner. But this statement that the schooner, at the earlier time, when she should have been seen, was on the steamer's starboard side, cannot be accepted. In fact, such proposition is not adopted by the advocate representing her on the trial, and is clearly untenable. That such was the fact when the vessels were in extremis is undoubted; and the evidence of the witnesses in behalf of the steamer must be held to relate to a time shortly before the collision. Hence it must be held that the steamer, sailing upon a course a half point off the schooner's port bow, and upon a course which, if maintained, would have taken her safely past the schooner, on the side, changed that course, heading across the schooner's bow, and towards the tow, which was on the starboard side of the schooner. This was the cause of the accident.

But it is urged that the schooner was also in fault. The argument is this: (1) The master of the schooner first saw the steamer's port light, which for some time indicated her course. (2) Later, and when the vessels were about a half mile apart, a ray of the steamer's green light appeared, and later, and when the steamer was some 300 feet away, such light opened, and was fully disclosed. (3) This showed the captain of the schooner that the steamer was taking an erratic course across the schooner's bow, in a manner highly dangerous to both vessels, and yet he kept on his course. (4) The captain of the schooner, when urged upon cross-examination to give his opinion concerning the same, likened the maneuver which the steamship attempted to the act of a crazy man. (5) Under such a state of facts,

the schooner should have shown a flash light, or have tried to go to port, to avoid the steamer.

In the first place, the rule requires the schooner to keep her course. It can hardly be said that no exigency could arise that would require a modification of the duty enjoined by this rule. It would be strange if any rule could be so comprehensive in its wisdom and usefulness that no departure from its terms would ever be required, however great the danger of observing it, and however salutary a departure from it. Nevertheless, it is a broad and general rule, intended to place the burden of avoiding a collision with a sailing vessel upon the approaching steamer. This exemption given to the sailing vessel is a constraint upon her. If she departs from the injunction that she shall keep her course, the burden is upon her to show some reasonable excuse therefor. A frequent disregard of the rule, a disregard not demanded by a clearly existing exigency, should not be excused. In the present case the schooner did, when the peril was fully apparent, try to go to port. The argument is that the master should have discovered the peril at an earlier moment. It was not a question of minutes, but of seconds. While the master did see a ray of the steamer's green light a half a mile away, yet the light itself came suddenly into view, when the vessels were not over 300 feet apart, and indicated a change of the course which the steamer had been pursuing for several miles, during which time the captain of the schooner was seeing and watching her red light. It is true that this witness states that, if the steamer had pursued the course indicated by the ray of the green light on the steamer, the latter would have struck the schooner pretty near head-on, although her previous course would have enabled the vessels to clear with an interval of a half or three-quarters of a mile. Should the master, when he saw this ray of green light, have starboarded? Should he have changed, so as to run across the steamer's original course?

The combined speed of the schooner and steamer was such that the interval of half a mile would have been covered in little over a minute. When the green light fully and suddenly appeared, they were 300 feet apart. This space was covered in a few seconds, probably not more than 10 or 15 seconds. It does not appear that the master of the schooner should have been so keenly alive to this suddenly manifested intention of the steamer to change her course as to require him to change his course, and the course enjoined by law upon him, so as to take up a course across the course that had for several miles been pursued by the steamer, and which course it showed but a faint intention to change,—an intention manifested by the ray of the green light. When the vessels were but a few hundred feet apart in distance, and some 10 or 15 seconds in time, with the burden of meeting the sudden aberration of the steamer, the vessels were in extremis; and it cannot be said, justly at least, that the schooner was at fault because she did not, with sufficient quickness, grasp the situation, and hard a-starboard, thereby abandoning her course, her previous duty, and her right of way. The steamer was where she was by her own gross fault, and in disobedience of all rules. The schooner was where she was of

right, and pursuant to all rules. The peril swiftly impended. She endeavored to starboard, but the recklessness of the steamer had precluded all possibility of avoiding the collision. The master of the schooner was required to act in a crisis, which he had in no part created. If he did not act with the highest wisdom and the supreme quickness required, he is not to be condemned. The authorities for this proposition are so abundant and controlling as to require no citation.

But it is said that she should have shown a flash light. At what time? When the ray of green light first appeared? When the green light suddenly appeared? When the steamer was a minute or a minute and a half away in time? When she was 15 seconds away? What has been said as to changing her course applies equally to this duty, which the steamer would now impose on the schooner. It requires a superlative diligence, apprehension, grasp of circumstances, and appreciation of dangers not required of her by law. She was carrying the lights required by law, and was not required to have a flash light in readiness, so that it could be sent off if a steamer chanced to run across her course, with scarcely more than a minute's, and possibly a few seconds', warning.

In conclusion, it may be stated that, in the opinion of the court, the accident was caused by the failure of the steamer to see the schooner's light, and that this happened from the fact that the watch on the steamer was changed, and the new watch was not advised of the sailing vessel, and had so recently come on deck that they did not themselves discover her. A decree should be entered in favor of the libellant, John W. Hall, against the steamship Gate City, for the damages to the schooner Joel Cook, arising from the collision, to be ascertained by a commissioner, with costs; and a decree should be entered dismissing the libel filed by the New England & Savannah Steamship Company against John W. Hall, with costs to the respondent.

PERKINS v. BOSTON & A. R. CO.

(Circuit Court, D. Massachusetts. November 17, 1898.)

No. 536.

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The rule restated that a federal court should lean towards a decision of the highest court of a state declaring a state statute penal in its nature, the question being peculiarly local, though it is not concluded thereby.¹

2. SAME—ENFORCING STATUTE GIVING REMEDY FOR DEATH.

An action based on Pub. St. Mass. c. 112, § 212, as amended by Acts 1883, c. 243, to recover from a railroad company for a death caused by negligence, is a penal action under a state statute, of which a federal court is without jurisdiction. Following *Lyman v. Railroad Co.*, 70 Fed. 409.

This was an action by Louis N. Perkins, administrator, a citizen of Connecticut, against the Boston & Albany Railroad Company, to recover for the death of his intestate, who was an employé of defendant company, under Pub. St. Mass. c. 112, § 212, as amended by Laws 1883, c. 243, which reads as follows:

"Sec. 212. If by reason of the negligence or carelessness of a corporation operating a railroad or street railway, or the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger or in the employment of such corporation, is lost, the corporation shall be punished by fine of not less than five hundred nor more than five thousand dollars, to be recovered by indictment prosecuted within one year from the time the injury causing the death, and paid to the executor or administrator for the use of the widow and children of the deceased in equal moieties; or, if there are no children, to the use of the widow; or, if no widow, to the use of the next of kin; but a corporation operating a railroad shall not be so liable for the loss of life by a person while walking or being upon its road contrary to law or to the reasonable rules and regulations of the corporation. If the corporation is a railroad corporation, it shall also be liable in damages, not exceeding five thousand nor less than five hundred dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and to be recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the persons hereinbefore specified in the case of an indictment. And if an employee of such corporation being in the exercise of due care is killed under such circumstances as would have entitled the deceased to maintain an action for damages against such corporation, if death had not resulted, the corporation shall be liable in the same manner and to the same extent as it would have been if the deceased had not been an employee. But no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by this section."

R. M. Saltonstall, for plaintiff.

Woodward Hudson and Samuel Hoar, for defendant.

PUTNAM, Circuit Judge. The parties agree that this suit is based on the Public Statutes of Massachusetts (chapter 112, § 212), as amended by the act of 1883 (chapter 243). The defendant has demurred on the ground that the action is strictly a penal one, and

¹ As to the following of state decisions by federal courts, see sections VII. and VIII. of note to *Wilson v. Perrin*, 11 C. C. A. 81, and sections IV. and V. of the supplementary note to *Hill v. Hite*, 29 C. C. A. 561.

claims that the case is governed by the decision of this court—Judge Carpenter presiding—in *Lyman v. Railroad Co.*, 70 Fed. 409. Judge Carpenter's decision applies to the provisions of the Public Statutes as unamended. There is very much in the Massachusetts legislation which tends to group it with the ordinary class of statutes giving remedies in cases of death which are held remedial within the rules of *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, and of the case with the same title, [1893] App. Cas. 150, and of which class *Stewart v. Railroad Co.*, 168 U. S. 445, 18 Sup. Ct. 105, is a striking example. Nevertheless, it may be in a large part from the fact that the provisions of the Public Statutes assess damages with reference to the degree of culpability of the defendant corporation, the supreme judicial court of Massachusetts evidently regards them "penal," in the technical sense of the word. We ought to lean towards the decisions of that court with regard to a topic so peculiarly local, although, as held in *Huntington v. Attrill*, 146 U. S., at page 683, 13 Sup. Ct. 224, they may not conclude us; and there is not sufficient in the act of 1883 to give the legislation a different character. If the Massachusetts legislation is strictly penal, we cannot enforce it, whatever may be the mere form of the proceeding. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 299, 8 Sup. Ct. 1370; *Huntington v. Attrill*, 146 U. S., at pages 672, 673, 13 Sup. Ct. 224. Under the circumstances, we must follow the ruling of Judge Carpenter, as no plain error appears in it, and as, also, it is not inconsistent with any subsequent decision of the supreme court or of any circuit court of appeals. Demurrer sustained; declaration adjudged insufficient.

HARRIS v. YOUNGSTOWN BRIDGE CO. et al. LOUISVILLE TRUST CO. v. SAME. COLUMBIA FINANCE & TRUST CO. v. SAME. GAULBERT et al. v. SAME. CENTRAL THOMSON-HOUSTON CO. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. November 9, 1898.)

Nos. 503-506, 519.

1. CORPORATIONS—MORTGAGES—AFTER-ACQUIRED PROPERTY CLAUSE.

An after-acquired property clause in a mortgage given by a corporation attaches to property to which the mortgagor subsequently acquires either the legal or equitable title, but subject to the limitation that the mortgagee is not a purchaser for value as to such property, and can take by way of lien no greater interest than that acquired by the mortgagor itself; and his lien is subject to all known liens or equities, valid against the mortgagor, which arise in the act of purchase or acquisition, and which qualify the scope and extent of its ownership.

2. SAME—PROPERTY PAID FOR BY THIRD PARTY.

A corporation issued bonds secured by a mortgage on its property, and also covering after-acquired property. It subsequently made additions to its property not contemplated when the mortgage was given, the money for which was furnished by a third party under a contract by which the corporation agreed to, and did before the property was conveyed to it, execute its bonds to such third party, secured by mortgage on the property so obtained. *Held*, it appearing that the transaction was in good faith, that the lien of such mortgage was superior to that of the first mortgage.

3. SAME—RIGHT OF WAY IN STREETS—IMPROVEMENT BY THIRD PARTY.

Such second mortgage, however, did not attach as a first lien to rights of way in streets granted to the corporation by municipal ordinances, or by individuals over their property, for a nominal consideration, nor to improvements thereon made by the mortgagee, though both were expressly included in the mortgage, and the improvement was necessary to prevent a forfeiture of the grants. The title to such rights of way, as realty, passed to the corporation at once on the passage of the ordinances or the making of the deeds, and became subject to the first mortgage, under the after-acquired property clause; and the lien for the tracks and improvements subsequently placed thereon by the second mortgagee, which became a part of the realty, did not arise out of the act of acquisition by the corporation.

4. SAME—PRIORITY OF LIENS.

A bridge company, which had executed a mortgage on its property, containing an after-acquired clause, made a contract with a trust company by which the latter agreed to purchase for the former land upon which to build new approaches to its bridge, and to pay the consequential damages which might accrue by reason thereof; the title to be conveyed to the bridge company upon repayment of the sums so expended. The contract further undertook to create liens upon the property, subject to the rights of the trust company, in favor of persons who should furnish the money to build the approaches. *Held*, upon a foreclosure of liens against the property of the bridge company, that the title of such company to the approaches was subject to the payment of the amount due the trust company, but that on its payment the property at once became subject to the first mortgage, and the contract was ineffective to displace such mortgage in favor of the liens for money expended in the improvement; the interest which was thus subjected to such liens being the interest of the bridge company, and not that of the trust company.

5. SAME—MECHANICS' LIENS.

A mechanic's lien for work and materials furnished for the building of the approaches under a contract with the bridge company, based on the mechanic's lien law of Kentucky of 1888, which gives a right to a lien "on the property and franchises of the owner and owners thereof," attached only to the equitable interest of the bridge company, and not to that of the trust company, to which it is subordinate; but, under the provisions of the statute that such lien upon the structure shall be prior in right to mortgages theretofore and thereafter created upon the land, it takes precedence of the liens created by the contract between the two companies in favor of those furnishing money to aid in building the improvement.

6. MECHANICS' LIENS—CONSTRUCTION OF CONTRACT—WAIVER OF RIGHT TO LIEN.

A contract for making improvements on property lying in two states, for a lump sum, and providing for the execution of notes for such sum, secured by collaterals, some of which notes did not mature within the time in which suits to enforce a mechanic's lien were required to be brought, is inconsistent with an intention that a right to such lien should exist, and an implied waiver of such right.

7. CORPORATIONS—FORECLOSURE OF LIENS—METHOD OF SALE OF PROPERTY.

Where it becomes necessary to decree the sale of the property of a corporation which is subject to divisional mortgages or liens, each of which constitutes a first lien on one part, and a subordinate lien on others, it is proper to direct that such parts shall be offered separately, and then the property as a whole, the bid or bids which will realize the larger sum to be accepted, and, if sold as a whole, to distribute the proceeds in proportion to the value of the different parts as established by the separate bids.

Appeals from the Circuit Court of the United States for the District of Kentucky.

Judson Harmon and Thos. W. Bullitt, for Theo. Harris.
St. John Boyle, for Louisville Trust Co.
W. O. Harris, for Kentucky Nat. Bank.
A. P. Humphrey, for Youngstown Bridge Co.
E. T. Trabue, for Columbia Finance & Trust Co.
W. M. Bullitt, for Gaulbert and others.
Helm Bruce, for Central Trust Co.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge. This action in equity was begun in the circuit court for the district of Kentucky by the complainant the Youngstown Bridge Company to foreclose a mechanic's lien asserted by it upon the bridge and approaches of the Kentucky & Indiana Bridge Company. The parties defendant to the bill included the Kentucky & Indiana Bridge Company; John H. Stotsenberg and Alexander Dowling, trustees under a first mortgage given by the company upon the bridge; the Louisville Trust Company, trustee under a second mortgage; Theodore Harris, trustee under a terminal deed of trust; and the Columbia Finance & Trust Company, claiming a lien upon a part of the bridge under another deed of trust. J. W. Gaulbert and others by intervening petition claimed a lien under the same deed of trust as that upon which the claim of the Columbia Finance & Trust Company was founded; and the Central Thomson-Houston Company, by intervening petition, claimed a mechanic's lien for the furnishing of an electric railway plant to the bridge company. The decree for sale by the circuit court directed the sale of the bridge and its approaches as an entirety, and marshaled the liens. This appeal questions the action of the circuit court in its adjustment of the priorities of the various liens, in its denying the existence of one of the asserted liens, and in its ordering the sale of the bridge and its approaches as an entirety.

The Kentucky & Indiana Bridge Company was the result of a consolidation of an Indiana company and a Kentucky company bearing the same name. In 1881 the consolidated and the two constituent companies issued a mortgage upon the bridge and its approaches, and upon all its after-acquired property, to secure \$1,000,000 of bonds of the consolidated company. The bridge was built to connect the cities of New Albany, Ind., and Louisville, Ky., and was intended for steam-railway, street-railway, and wagon transportation, and foot passengers. The original construction included an approach on the Kentucky side, built of wood, and a railway extending from the south end of the bridge, west of Louisville, to Fourteenth street, in that city, where a connection was made with the line of the Short-Route Transfer Railway Company. The bridge as thus constructed is known as "the bridge and the main line." In 1886, for the purpose of securing the Ohio & Mississippi Railway Company as a tenant, the bridge company agreed to connect the bridge with other railroads in the city of Louisville, and to reconstruct the wooden approach by a steel structure. The company had no funds, but succeeded in procuring these

additions and improvements to the bridge and railway by two trust deeds hereafter described. Under a so-called "terminal trust deed" to Theodore Harris, trustee, land was purchased, and a track was built several miles in length, connecting the bridge with the Chesapeake & Ohio Southwestern and the Louisville & Nashville Railroads, and a freight yard was established on the line. Another track was built, connecting the main line of the bridge with the Monon and Ohio & Mississippi Railway terminals. Under this deed an indebtedness of \$400,000, evidenced by negotiable bonds, was contracted, for which a lien prior to the first mortgage bonds is claimed upon the railway, the freight-yard structures, and the approaches built in accordance with its provisions. Under the trust contract with the Columbia Finance & Trust Company, land was bought, and a new steel approach substituted for the old wooden one, in the main line. In the construction of this steel approach the debt was contracted for which the Youngstown Bridge Company claims a mechanic's lien. The claim of the Columbia Finance & Trust Company arises out of the money advanced to buy the land for this approach, and a lien upon the land bought is asserted, prior in right to that of the first mortgage upon the bridge. The property has been ordered to be sold, subject to the lien of the first mortgage, but the trustees under that mortgage were made parties in order to be heard on the question of priority between them and the trustee under the terminal trust deed.

The issues which arise for decision are: (1) Is the lien of Theodore Harris, trustee under the terminal trust mortgage upon the new approaches and connections described therein, prior in right to that which the first mortgage bondholders have upon the same property by virtue of the after-acquired property clause in their mortgage? (2) Is the lien of the Columbia Finance & Trust Company upon the land and structure upon which the new steel approach in the main line was built prior in right to that of the first mortgage? (3) Is the lien of J. W. Gaulbert and others upon the new steel approach prior to the first mortgage? (4) Is the lien of the Youngstown Bridge Company prior in right to that of Gaulbert and others? (5) Has the Thomson-Houston Company any mechanic's lien whatever upon the property of the bridge? (6) Should the circuit court have ordered the bridge and all the approaches and terminals sold as an entirety? We shall consider these questions in their order.

1. The first mortgage conveyed the bridge of the company to Dowling and Stotsonberg, trustees, by the following description:

"Its lands, bridge piers, abutments, toll houses, approaches, and all the property, real, personal, and mixed, wherever situated, and all its rights, privileges, franchises, immunities, owned or possessed, or which may be hereafter acquired, by it, * * * and which may be acquired by further legislation, or in any manner whatever."

The bonds issued under this mortgage had been sold and were all outstanding prior to October, 1886. The bridge and its main line were completed in the summer of 1886. The railway and approaches acquired under the terminal trust deed for the purpose of complying with the Ohio & Mississippi Railway contract were secured and constructed in the fall of 1886 and the spring of 1887. This was done in accordance

with a contract between the bridge company and the Southwestern Contract & Construction Company, in which the contract company undertook, with the bridge company, by purchase or otherwise: To acquire the right of way for a connection with the Chesapeake, Ohio & Southwestern Railway and the Louisville & Nashville Railroad at points south of Maple street; the precise location within the limits named to be fixed by the bridge company. To acquire in fee, for the use and benefit of the bridge company, such amount of land as might be esteemed by the bridge company necessary for its yards, yarding, machine shops, repair shops, roundhouses, station buildings, and other terminal facilities, not exceeding 30 acres; the same to be upon the line of railroad already provided for, and upon such points of the line as the bridge company might direct. To grade the roadway, and construct thereon a double-track railroad, making its connection with said railroads at such points, and of such lengths, as might be designated by the bridge company, not exceeding in the aggregate one mile in length; the entire work to be done in accordance with the specifications mentioned in the contract. To acquire the right of way for a double-track railroad from a point between Fifteenth and Seventeenth streets, on the line of said bridge company's existing railway, in the city of Louisville, to a connection of the tracks of the Louisville, New Albany & Chicago Railroad Company and the Ohio & Mississippi Railroad Company, on or near Fourteenth street, and south of Portland avenue, together with such switches as might be required by the bridge company, and to construct thereon a double-track railroad. The entire construction was to be in accordance with the plans and under the supervision of the chief engineer of said bridge company. The bridge company, on its part, agreed to permit the use of its name for the condemnation of any property necessary to the acquisition of such rights of way. The contract company agreed to pay for all the necessary rights of way and land condemned or purchased, and all labor and material, and to cause the same to be conveyed to the bridge company free from lien or claim thereon by any person, excepting only the lien of the terminal deed of trust, hereafter described; and in consideration of the promise the bridge company bound itself to deliver to the contract company, immediately upon the execution of the contract, its negotiable coupon bonds, 400 in number, aggregating in amount \$400,000.

The contract provided that the payment of the bonds should be secured by a terminal deed of trust, in which the lands, rights of way, buildings, and all the appurtenances thereto, should be conveyed to Theodore Harris, as trustee, and should be further secured by a similar deed of trust to be executed by the bridge company, conveying by mortgage to Theodore Harris, trustee, the main-line approach of the bridge company, and all other branch lines extending therefrom, to connect with other railroads or depots in the city of Louisville, and all terminal facilities connected therewith. The deed of trust in pursuance of this contract was made on the 1st of December, 1886, between the Kentucky & Indiana Bridge Company, the Southwestern Contract & Bridge Company, E. F. Trabue, trustee (in whose name much of the real estate was acquired by the contract company), and Theodore Har-

ris, trustee. After reciting the contract, and the fact that the parties had begun its execution, and setting out the form of negotiable bonds issued by the bridge company, the deed is declared to be "for the use and benefit of the persons who may at any time become the holders of said bonds or coupons." Subject to the lien of the conveyance theretofore made to Theodore Harris, trustee, for the purposes and trusts set forth therein, the said E. F. Trabue, trustee, and said contract company, granted and conveyed to the Kentucky & Indiana Bridge Company the entire lands and rights of way in the deed described or mentioned, with all structures and improvements then existing or thereafter to be erected hereon, excepting only the existing line of railway connecting said bridge with the Short-Route Railway Transfer Company, which was already vested in said bridge company.

The contract company was originally organized in 1881, at the instance of the directors of the bridge company, to build the bridge for the bridge company, in consideration of a large amount of the first mortgage bonds and the capital stock of the bridge company. The contract company complied with the contract, and built the bridge. It seems to have taken contracts from other companies for construction. The company was run by its president and secretary, who made contracts in its name, from time to time, without calling a meeting of its directors. Between 1884 and 1888 it does not appear that any directors' meeting was called. In 1888, however, the board of directors confirmed all the contracts made by its president. The capital stock of the construction company was \$10,000. It does not appear from the record that at the time of the making of this contract, or indeed at any other time, the stockholders of the contract company and the bridge company were the same, except as it may be inferred from the fact that part of the contract price for building the bridge received by the contract company was stock in the bridge company. The two companies did not have the same officers, and, so far as appears, they did not have the same directors. The bonds under the terminal trust deed were delivered at the time of the execution of the deed, and not at the time of the execution of the contract. When the deed was executed the contract company had already purchased, and had taken in its name, or that of Trabue, trustee, 30 acres of land afterwards used for freight yards, and about one-half of the private property needed as a right of way for the proposed improvements; and, from the recitals of the deed, we may infer that the work of laying the track and making other improvements had been under way for some time. It is agreed as a fact that Theodore Harris, the trustee under the terminal trust deed, was not advised, either at the time of receiving the deed or afterwards, of any facts conducing to show that the contract company and the bridge company were otherwise than independent corporations contracting in good faith with each other in manner and form as provided by the deed of October 1, 1886, and that all the bonds were sold for value before this action began. The new railway approaches were 26,609 feet in length. Of this, 8,300 feet was laid upon the streets and alleys of the city of Louisville, under ordinances granting to the bridge company the right to occupy them with tracks. An additional 2,864 feet was laid along the streets in Parkland, a suburban

town, under similar ordinances. 7,135 feet was laid upon private property, which had been either condemned in the name of the bridge company, or conveyed directly to it,—some of it by gift, and some by purchase. 680 feet of track was laid on land that has never been paid for or conveyed. Thus, the total length of 18,299 feet, or about two-thirds, was constructed upon rights of way which were conveyed directly to the bridge company. The remaining one-third of the right of way was conveyed either to the contract company, or to E. F. Trabue, trustee.

It is well settled, since the decision of the supreme court of the United States in *Pennock v. Coe*, 23 How. 117, that one may execute a mortgage, valid at least in equity, upon property not in existence or not owned by him, the lien of which will immediately attach to the property when it shall come into existence, or become the property of the mortgagor; and this whether the title of the mortgagor is legal or equitable. The rule has been applied both to real and to personal property. *Dunham v. Railway Co.*, 1 Wall. 254, 266; *Railroad Co. v. Cowdrey*, 11 Wall. 459, 481; *U. S. v. New Orleans R. R.*, 12 Wall. 362; *Dillon v. Barnard*, 21 Wall. 430, 440; *Fosdick v. Schall*, 99 U. S. 235, 251; *Myer v. Car Co.*, 102 U. S. 1; *Porter v. Steel Co.*, 122 U. S. 267, 283, 7 Sup. Ct. 1206; *Thompson v. Railroad Co.*, 132 U. S. 68, 74, 10 Sup. Ct. 29; *Railroad Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546; *Trust Co. v. Kneeland*, 138 U. S. 414, 423, 11 Sup. Ct. 357; *McGourkey v. Railway Co.*, 146 U. S. 536, 567, 13 Sup. Ct. 170; *Wade v. Railroad Co.*, 149 U. S. 327, 341, 13 Sup. Ct. 892; *Irrigation Co. v. Garland*, 164 U. S. 1, 17 Sup. Ct. 7. The limitations of the rule are clearly drawn in the foregoing cases. The chief is that the mortgagee of after-acquired property is not a purchaser for value, and cannot acquire an interest by way of lien greater than that which the mortgagor has himself acquired. The lien of the mortgage attaches to after-acquired property in the condition in which the mortgagor takes it from his vendor, and subject to all known liens and equities valid against the vendor, and also subject to all liens or equities valid against the vendee and mortgagor which arise in the act of purchase or acquisition, and therefore necessarily qualify its scope and extent. Thus, a vendor's lien on the property, good against the mortgagor, is prior in right to that of the mortgagee under an after-acquired property clause. So, too, a purchase-money mortgage upon after-acquired property is not displaced by the lien of a prior mortgage of the mortgagor containing an after-acquired property clause, because in equity the purchaser is regarded as taking only the difference between the value of the property and the amount still due on the price. *U. S. v. New Orleans R. R.*, 12 Wall. 362. In cases of conditional sales to the mortgagor, the mortgagee, under the after-acquired property clause, obtains a lien subject to the same defeasance or forfeiture as that to which the title of his mortgagor is subject. *Fosdick v. Schall*, 99 U. S. 235, 251; *Myer v. Car Co.*, 102 U. S. 1; *Trust Co. v. Groome*, 2 U. S. App. 95, 105, 1 C. C. A. 133, 48 Fed. 868; *Loomis v. Railroad Co.*, 17 Fed. 301, 305. And it is even held that if the property comes into the hands of the mortgagor subject to a lien which is good against him, though, for want of formalities, it is not good against his subsequently attach-

ing creditors and third persons, it is nevertheless prior to the lien of a mortgagee under an after-acquired property clause. And so, where the legal or equitable title of the mortgagor ripens and is acquired only through the outlay or expenditure of another, under such circumstances that, as between the other and the mortgagor, the former has a lien in equity upon the interest of the latter, the prior mortgage with an after-acquired property clause attaches only to the interest of the mortgagor subject to the same lien. *Irrigation Co. v. Garland*, 164 U. S. 1, 17 Sup. Ct. 7; *Botsford v. Railroad Co.*, 41 Conn. 454. Where, therefore, at the instance of the mortgagor, a third person pays the purchase money for additions, and takes title to them himself, or directs their conveyance directly to the mortgagor, with an express agreement that he shall have a lien for the purchase money, such lien is prior to that of the mortgagor, because it is only through his expenditure that the purchase is effected and the addition acquired. This is not a fraud upon the mortgagee, or a violation of any right of his, in any case where the mortgagor is under no affirmative obligation to the mortgagee to acquire additions to the property, or to acquire them free of lien. It may very well be that, unless the purchase money is secured by a first lien, no addition will be acquired. The security of the first mortgage is increased by the difference between the value of the addition bought, and the part of the price which the mortgagor did not pay. It is not perceived what prejudice the mortgagee suffers by the transaction. His security is certainly not worse, and it may be a great deal better, than before. Nor do we perceive that it destroys the lien that the debt contracted by the mortgagor for the purchase money is evidenced by negotiable bonds secured by mortgage delivered before the land is transferred. The bonds and mortgage are intended to represent, and do represent, a lien growing out of the acquisition of the lands, and the future holders of them are only the assignees of a purchase-money lien. So long as the lien asserted is for money used in good faith to acquire the very thing upon which the lien is claimed, we do not see how the first mortgagee is defrauded. When, however, that which is given the appearance of a vendor's or purchase-money lien is really only a device to secure money borrowed for other purposes of the mortgagor than the buying of the addition in question, then the attempt to supplant the first lien of the mortgage under the after-acquired property clause is a fraud upon the mortgage, and the pseudo purchase-money lien must be postponed to that of the mortgage.

It is urged upon the court that such a conclusion as that just reached will make it possible to commit great frauds upon first mortgage bondholders. It is said that most first mortgage bonds are issued in advance of the acquisition and improvement of the mortgaged property, with the understanding that the money paid for the bonds is to be used to buy and construct the subject-matter of the mortgage, and that this very useful plan will be entirely defeated, if the mortgagor may, by a device like that here used, create liens on the newly-acquired property prior in right to the original mortgage. Our conclusion would not validate any such proceeding as that supposed in the illustration. There is a clear distinction between the obligations of a mortgagor

under a mortgage in which the property described as mortgaged, though definitely described, is yet to be bought and constructed, and the obligations of one under a mortgage in which the property described as mortgaged is in existence as a completed thing, and the after-acquired property clause is inserted only to increase the original security. In the former class of cases the mortgagor is impliedly bound to buy and complete the thing mortgaged as described, and bring it under the lien of the mortgage, without burden or incumbrance. Such was the case of *Wade v. Railroad Co.*, 149 U. S. 327, 13 Sup. Ct. 892; and such, too, is the case of *Venner v. Trust Co.* (decided to-day by this court) 90 Fed. 348. In the latter class of cases the mortgagor is bound neither to make additions, nor, if he does make them, to free them from prior liens arising in and out of the act of acquisition. In the case at bar the bridge, as originally projected and contracted for, with approaches and railway connections on both sides of the river, had been completed, and the proceeds of the bonds issued under the first mortgage, and the capital stock had been honestly expended for this purpose. That which was done under the terminal trust deed was an addition to the original plan, not contemplated when the bridge was begun, but made necessary by the demands of the Ohio & Mississippi Railway Company as a condition of its becoming a tenant of the bridge. It was of the greatest benefit to the first mortgage bondholders that what the Ohio & Mississippi Railway Company proposed should be accepted. It secured a revenue from the bridge large enough to insure the prompt payment of the interest on the first mortgage bonds. It is further apparent from the record that, unless an arrangement had been made by which the terminal bonds could be given a first lien on the property to be purchased and improved, the proposed contract with the Ohio & Mississippi Railway Company would have failed, and the payment of interest on the first mortgage would have been rendered very doubtful. We are therefore of opinion that in the case before us all the rights of way which were purchased and paid for by the contract company, together with all the improvements placed thereon by that company, whether the rights of way were first put in the name of Harris, trustee, as the contract required they should be, before transfer to the bridge company, or were conveyed directly to the bridge company, without the interposition of Trabue or Harris, trustee, are subject to a lien in favor of Harris, trustee, for the bondholders, prior to that of the first mortgage. This will include the two lots acquired by condemnation, for which the contract company paid the full purchase price. The payment of the price was a condition precedent to the passing of any title at all, and the contract company, and Harris, trustee, for the bondholders, in thus effecting the purchase, are entitled to rely on the rights secured to them by their contract with the bridge company.

The learned judge who heard this case at the circuit was led to the conclusion that the terminal trust deed did not secure a first lien on the new terminals to the holders of bonds issued under it, because he found that the contract company was nothing but the alter ego of the bridge company, with no real, independent existence, and with no capital or means of carrying out the contract except what the bridge

company furnished it. He held, therefore, that here was presented, not the case of a third person's becoming the purchaser of lands needed by the bridge company, and his bona fide sale to the company, with a vendor's lien reserved for the price, but rather the case of a nominal and subsidiary corporation of the bridge company, acting really as its agent in buying land for it with its own credit, while masquerading as a purchaser and vendor for the purpose of wrongfully evading the lien of the first mortgage on the newly to be acquired terminals. We have examined the record with care, and do not find the facts upon which this conclusion can be supported. The contract company originally built the bridge. There was no reason to suppose that it was not equal to building the terminals. Before the bridge company delivered its bonds to the contract company, the latter had acquired half the land which was to be bought under the contract for the right of way, and had begun the work of improving it. There is nothing to show any identity of ownership in the two companies. The capital of the contract company was comparatively small, but that fact alone does not show the mala fides of the construction contract. Nor does the early delivery of the bonds involve this. It is not unusual for construction companies to look to deliveries of bonds in installments as the work progresses to supply the necessary funds with which to continue construction. The failure of the minutes of the contract company to disclose any directors' meetings for four years only shows that the company was run by its officers, not that it was run by the bridge company. More than this, Harris, trustee, represents bondholders who bought their bonds for value in the open market, and it is stipulated that he had knowledge of no facts conducing to show that the contract company and the bridge company were otherwise than independent corporations contracting in good faith with each other, as shown on the face of the trust deed. Of course, the plan was carefully devised, in order to enable those who should become bondholders to obtain a lien prior to that of the first mortgage. Otherwise, doubtless, the bonds would not have sold for the prices they brought, and the contract company would not have agreed to buy the land and do the work for them. But this purpose does not render what was done in pursuance of the plan fraudulent. Before this is true, it must be shown that the contract and equitable rights of the first mortgage bondholders were in some way infringed by what was done. It must appear that the bridge company was really mortgaging to Harris, trustee, that in which it had a complete legal or equitable title before the mortgage was given and took effect. For the reasons already stated, we do not think the record discloses such a case.

What has been said applies only to the private property bought by the contract company with its money. With respect to the rights of way obtained by ordinances from the city of Louisville and the village of Parkland, the case is different. The contract company paid nothing for these rights of way, and contributed nothing to their acquisition. Therefore they came into the possession and enjoyment of the bridge company burdened with no lien except such as might arise from the improvement of that which was already the property of the bridge company. The right which a city confers upon a railway company to

occupy its streets with its track is an easement; an incorporeal hereditament; real estate. *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36, 22 C. C. A. 334, 76 Fed. 296. In the case at bar the right was conferred without express condition. The only condition to be implied was a condition subsequent,—that unless the right was exercised, and the tracks laid and used in a reasonable time, the grant should be regarded as abandoned, and fail. Upon the passage of the ordinances, therefore, the rights of way vested in the bridge company; and every improvement constructed thereon became attached to the real estate of that company, and subject to the lien of the first mortgage under the after-acquired property clause. The operation of the after-acquired property clause in real-estate mortgages is much affected by the principle, so well established in the common law of real estate, that whatever is attached to land becomes a part of it, and loses its character as personalty. The principle has exceptions. As between landlord and tenant, heir and administrator, and vendor and vendee, custom or contract may enable the one who affixed the articles of personalty to detach them. In the absence of special contract, however, as between a mortgagee of realty and one who subsequently makes a permanent attachment of personalty to the land, the rule is that the lien of the mortgage covering the realty necessarily covers the fixtures, as part of the land, and all liens attaching to the fixtures merely as personalty are displaced by it. This is really based on the doctrine of accession. The personalty has been converted into realty. The only remedy of the owners or lienors of the personalty is personal against the converter, and their remedy against the res is destroyed by its ceasing to be. Hence, all contractors and material men, in the absence of a statute providing otherwise, who stipulate with the owner of realty that they shall have a lien upon the improvements on the land created by their work, and materials, and on default in payment a right to remove them, only acquire a right in them subordinate to the lien of the prior mortgagee of the realty. *Railroad Co. v. Cowdrey*, 11 Wall. 459; *Porter v. Steel Co.*, 122 U. S. 267, 7 Sup. Ct. 1206; *Thompson v. Railroad Co.*, 132 U. S. 68, 10 Sup. Ct. 29; *Wade v. Railroad Co.*, 149 U. S. 327, 13 Sup. Ct. 892. It follows that the lien given by the after-acquired property clause of the first mortgage attached to the rights of way in the streets immediately upon the passage of the ordinances, and that improvements upon the rights of way only increased the security by becoming part of the realty. The lien asserted by Harris, trustee, on this part of the terminals, did not arise in the act of acquisition, but only in the improvement after acquisition. An ingenious argument is made to show that the bridge company obtained no title to the rights of way in the streets until the tracks were laid and the railroad was completed, and that by analogy to the case of *Irrigation Co. v. Garland*, 164 U. S. 1, 17 Sup. Ct. 7, the lien for the improvement accompanied the right of way into the possession and enjoyment of the company, because the improvement was necessary to the acquisition, and inhered in the title, which was ripened by it. The argument fails, because, as already stated and decided in this court, it was the ordinance which passed the title, and not the laying of the tracks by its authority.

It remains to consider those cases in which the land for rights of way was given for a nominal consideration to the bridge company. It is impossible to distinguish them from the rights of way granted by ordinance. The title to the land passed to the bridge company, and the improvements constructed thereon became a part of the realty of that company, to which the lien of the first mortgage attached the moment the title to the land passed to the company. The lien of Harris, trustee, upon such lands, must therefore be postponed to that of the first mortgage.

The result is that the lien of the terminal trust bondholders upon the new terminals is, as to that part situate upon real estate or rights of way for which the contract company paid, prior in right to the lien of the first mortgage, to the extent of the sums expended in buying the lands or easements, and in erecting the necessary structures thereon, but that as to the remainder of the new terminals their lien is junior to that of the first mortgage. The new terminals, however, cannot now be divided up into their component parts; and these two liens upon the separate portions must, in view of the unit character of the subject-matter of the liens, be transferred to an undivided portion of the whole. Unless the parties can agree upon the proportionate value of the two parts of the new terminals distinguished as above, then the case must be referred to a master for decision of the question. If, then, for illustration, the master were to report that the terminals were worth \$300,000, of which the part bought by the contract company was worth \$100,000, and it had expended in its purchase and improvement \$100,000, then the result would be that the terminal trust bondholders would have a lien to the extent of \$100,000 on an undivided one-third of the new terminals, and the first mortgage bondholders would have a lien on the remainder to secure their entire claim.

2. The lien of the Columbia Finance & Trust Company arose under a contract between that company and the bridge company, by which the trust company agreed to purchase the necessary right of way for the purpose of erecting a new approach to the bridge to take the place of the old wooden approach. The contract stipulated that the title to the property for the approaches was to be taken in the name of the trust company, and was to be conveyed to the bridge company when that company paid to the trust company the money expended in its purchase, together with a reasonable compensation for the transaction. It was further provided that, in case there were consequential damages to other property by the use of the property bought for bridge purposes, such damages, to the extent of \$3,500, were to be paid by the trust company, and reimbursed to it. The money advanced by the trust company to buy these lots has never been paid by the bridge company. The title to the lots was taken in the name of the trust company. The only title, therefore, which the bridge company has in the property is the title which is subject to the payment of the purchase price, which the Columbia Finance & Trust Company, as the holder of the lots, is entitled to. This property was bought, not with the money of the bridge company, but with the cash of the trust company. The consequential damages were a part of the cost of the

property bought for the use of a bridge. Therefore they are a part of the purchase price which the bridge company owes to the trust company for the same lots. The same is true with reference to compensation for services due the trust company, and so-called "interest." The bridge company never acquired any interest or title in the land, except as it was subject to these vendors' liens, for they are strictly such.

3. We now come to the intervening petition of J. W. Gaulbert and others, based upon two notes of the bridge company (one for \$8,000, and the other for \$1,000), upon which the petitioners became indorsers at the request of the bridge company, and which they have been obliged to pay. They claim a lien upon the property held in trust by the Columbia Trust Company junior to the lien of that company, but prior in right to the lien of the first mortgage. Their case rests on the following provision of the trust agreement between the bridge company and the Columbia Trust Company:

"After the said trust company shall have been fully repaid the advances to be made by it for the purchase of ground as above mentioned, the said property conveyed to it as aforesaid, and the said railroad to be constructed thereon, shall be held by said trust company in trust to secure the payment of such moneys as may be advanced by any other persons to or for the account of the bridge company to enable it to pay for the labor and material to be used in the construction thereof. The amounts of said advances by other persons, with the names of the parties making the advancements, and who shall become thereby entitled to the benefit of the security of this trust deed, shall be furnished from time to time by the bridge company to the trust company; it being understood that the term 'advances' shall embrace, not only money loaned by individuals to the bridge company, but moneys raised upon notes or other obligations upon which individuals may have become bound for the bridge company, as indorsers, guarantors, accommodation makers, or otherwise; and, subject to the right of the trust company to its prior lien, it shall, when called upon, take all proper steps to subject the trust property herein above mentioned to the payment of said advances; but the time within which the advances to be made by the trust company shall fall due under this agreement shall not be prejudiced by any arrangement with such other persons."

It is by no means clear that the money raised upon the two notes here in question was kept as a trust fund to build the structure. It seems to have been turned into the general account of the bridge company, and all that the president of the bridge company can say is that an amount equal to the sum so raised was at some time expended by the bridge company in the erection of the new part of the bridge. In our view of the case, it is not very material how the money was expended, for on no possible hypothesis can the lien to secure the indebtedness supplant that of the first mortgage. The after-acquired property clause in a mortgage does not displace any equitable lien which really grows out of the act of acquisition, by purchase or otherwise, so that the mortgagor may be properly said to acquire the property with the lien on it, or less the lien. It is not infrequently a nice question to decide whether the lien really inheres in the act of acquisition, or whether it is given the false appearance of doing so at the instance of the purchaser, for the purpose of evading an after-acquired property clause in a prior mortgage, and is really nothing more than a lien taking effect after the act of acquisition, and not as part of it, and is thus subordinate to the mortgage. In the case of

McGourkey v. Railway Co., 146 U. S. 536, 13 Sup. Ct. 170, the issue was between the mortgagee under an after-acquired property clause and the lessors of certain equipment, as to priority of liens. The court found that though the leases, in form, purported to convey the equipment to the railroad company, reserving a lien, the fact was that the company had actually bought them with its own funds, and that subsequently a lease was executed covering them to secure funds advanced to the company by the directors for other purposes, and that the leases were only evidences of a lien attaching to the equipment after it had been purchased by the railroad company, and that it was therefore subordinate to the lien of the prior general mortgage, with an after-acquired property clause. In like manner, we must hold the arrangement now under discussion ineffective to displace the lien of the first mortgage. The creditors sought to be secured were the creditors of the bridge company. They loaned their credit to the bridge company to enable it to borrow money to build its own bridge. The bridge company secured to them a lien on its equitable interest in the land bought for it by the Columbia Trust Company, after it should have paid the purchase price to the trust company. To that equitable interest the lien of the first mortgage attaches the moment the purchase money is paid. As the learned judge of the circuit well said, "The interest which was thus made subject to these advances was the interest of the bridge company, and not the title or interest of the trust company." The lien of Gaulbert and others upon the new approach is therefore subordinate to the lien of the first mortgage.

4. The lien of the Youngstown Bridge Company grows out of the mechanic's lien law of 1888. That provides that any one complying with the provisions of the statute shall have a lien on the property and franchises of the owner and owners thereof for the full contract price of said labor and material, etc. The Youngstown Bridge Company erected the bridge on land which was held by the Columbia Finance & Trust Company. The contract by the Youngstown Bridge Company was with the Kentucky & Indiana Bridge Company. We concur in the view of the court below that, as the lien can only arise against the property of the owner, the contract made by the Kentucky & Indiana Bridge Company did not confer a lien upon the interest that the trust company had in the property upon which the bridge was built, and therefore that the lien must be subordinate to the rights of the Columbia Finance & Trust Company in the main line of the bridge. As between the Youngstown Bridge Company and J. W. Gaulbert and others, however, the result must be different. Gaulbert's only lien is on the equitable interest of the bridge company, and to that the mechanic's lien also attaches. The statute which gives the mechanic's lien provides that the lien upon the structure shall be prior in right to mortgages theretofore and thereafter created upon the land. This, of course, applies to prior or subsequent liens as well. As a consequence, the mechanic's lien of the Youngstown Bridge Company must be prior in right to that of J. W. Gaulbert upon the equitable interest of the bridge company in the property conveyed to and held by the Columbia Finance & Trust Company.

5. The claim of the Central Thomson-Houston Company for a me-

chanic's lien cannot be sustained. The work done was on both sides of the river, in Kentucky and in Indiana, on the bridge, on the street railway of the New Albany Street-Railway Company, and on the Short-Route Transfer Company tracks. The contract provided for the payment of the lump sum of \$32,000, which was afterwards reduced to \$27,000. The statutes relied on had no extraterritorial effect, and, if the parties intended to secure a lien under the Kentucky statute, it would have been natural for them to fix in the contract the cost of the work done in Kentucky. The notes for the lump price were given with the agreement for renewals, and two of them did not fall due in the time within which a suit must have been brought under the mechanic's lien statute. Provision was made in the contract for the deposit of bonds of the Albany Street-Railway Company, to secure the notes, and the bonds were deposited. We concur with the circuit court in its construction of the contract, and its view that the terms of the contract were inconsistent with the intention on the part of either party that a lien should exist, and therefore that any claim for a lien was impliedly waived by the contract. For a fuller discussion of this point we refer to the able and satisfactory opinion of the learned judge who heard the case at the circuit.

6. The only question remaining is as to the mode of sale. Shall the bridge be sold as a whole? Or shall the bridge and the main line be sold as a parcel, and the new terminals be sold as a parcel, and then the whole be offered as an entirety? The circuit court ordered the bridge and all the terminals sold as an entirety. We shall not discuss the wisdom of that order, because it was based on a conclusion as to the rights of the parties in the new terminals different from that which we have reached. Harris, trustee under the terminal trust deed, and Dowling and Stotsonberg, trustees under the first mortgage deed, are, so to say, tenants in common of the terminals covered by the terminal trust deed, in proportions to be fixed by a reference. It is of much importance, therefore, that the value of the new terminals should be established by a sale. This may be done by offering the terminals separately, the bridge and main line separately, and then the bridge and all the terminals as an entirety. If the bids for the parcels are less than the bid for the whole, then the latter bid shall be accepted. If greater, then the separate bids shall be accepted. In either case the separate bids fix the relative value of the parcels. The statute under which the terminals were erected provided that they might be mortgaged separately. This, of course, implied the power and duty of the court, in a proper case, to order them sold separately. The second mortgage bondholders who have a lien on the bridge and terminals as an entirety, pray for a sale of the parcels, and then a sale of the whole. Only the Ycungstown Bridge Company, with a lien for \$20,000, asks a sale of the whole without a sale by parcels. This lien is subordinate to the lien of Harris, trustee, on the new terminals, and subordinate to that of the Columbia Trust Company on the bridge and main line. The voice of its owner ought not to be given great weight, therefore, in influencing the discretion of the court to depart from the ordinary course pursued in the sale of a unit property, parts of which are covered by divisional mortgages. The sale

of the parcels and the sale of the whole seem to give all parties a better opportunity to protect themselves against a sacrifice sale. The sale decreed by the circuit court was a sale subject to the lien of the first mortgage. It is not necessary to change this, except to declare that the prior lien of the first mortgage covers only an undivided part of the new terminals, and the purchaser will take the same subject to such a lien. The junior lien, which the first mortgage trustees will have on the remainder of the new terminal, will simply give to them a right to redeem that remainder from the purchaser. The decree of the circuit court is in part affirmed, and in part reversed, and is remanded to the circuit court for further proceedings not inconsistent with this opinion.

ROBB v. DAY et al.

(Circuit Court of Appeals, Sixth Circuit. November 14, 1898.)

No. 566.

1. ESTOPPEL—DEFECTIVE DEED—RECOGNITION OF GRANTEE'S TITLE.

Where a man, after conveying property through a third party to his wife, took and recorded a power of attorney from her, authorizing him to manage the property as her agent, under which he made leases in her name, and during the remaining 30 years of his life many times admitted, and never denied, her title to the property, his devisees are estopped from denying the legal sufficiency of the deeds by which the title was conveyed to her.

2. EQUITY—LACHES—ENFORCEMENT OF PAROL TRUST IN REAL ESTATE.

A delay of 23 years by one claiming an interest in real estate under a parol trust, and his devisees, after he had knowledge that the trust was denied by the holder of the legal title, before commencing suit to establish such trust, is such laches as will bar relief, in the absence of special circumstances excusing such delay.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

The statement of the case by Judge SWAN at the circuit is given below:

The bill in this cause was filed against Daniel Hand in his lifetime, to enforce an alleged trust in, and to obtain an accounting of, the rents, profits, and proceeds of lots 6, 7, 8, and 9 of the military reserve, in Detroit, said lots having a frontage upon Michigan avenue of about 200 feet. The property described is near the center of the city of Detroit, and is valued at more than \$100,000. The original defendant, Daniel Hand, was a citizen of the state of Connecticut; and this suit was instituted under the provisions of section 8 of the act of March 3, 1875 (18 Stat. 470), by the service upon him of the order provided for in that section, requiring him to appear and plead. Hand died before the case was brought to issue upon the pleadings, and the defendant Morris was substituted as his executor. Pending the suit, Morris died, and Wilbur F. Day, a citizen of Connecticut, has been substituted as the representative of the estate of defendant Hand. The original complainant, Cromellen, was a citizen of Nebraska, and sued as administrator with the will annexed of Rowland Cromellen, deceased. Complainant died pending the suit, and John H. Robb, a citizen of the state of Nebraska, has been substituted as the representative of the estate of Rowland Cromellen, deceased. The bill of complaint is framed upon the theory that the property above described, in which it seeks to have a trust declared, and for a recovery of the rents and profits of the same, was owned by Rowland Cro-

mellen, deceased, although the legal title was of record in Amelia Cromelien, his wife, and so remained during the period in which the transactions complained of by the bill occurred.

To a proper understanding of the questions in the case, a brief history of the title to the lots, in which the complainant seeks to have a trust declared, and an accounting of rents and profits, is essential. About the 11th of June, 1833, Rowland Cromelien, the ancestor of the original complainant, received from the city of Detroit certificates in his own name for the purchase of the lots in question. These were paid for, as appears from the municipal records, in installments; and on January 14, 1836, the city of Detroit executed and delivered a deed of said lots to Amelia Cromelien, the wife of Rowland, which recites the payment by the grantee, Amelia, at the consideration for the conveyance, which it acknowledges had been received from her. September 26, 1836, Rowland and Amelia conveyed the property to one Seymour; and on October 31, 1836, Seymour executed a deed thereof to Rowland, the husband. Rowland held the property under Seymour's conveyance until April 4, 1842, when he and his wife united in a deed thereof to Washington Cromelien, who, on the next day, April 5, 1842, conveyed it by warranty deed to Amelia. The bill ignores entirely the last two conveyances, and the complainant denies any efficacy to them whatsoever, insisting that, by reason of defects in the acknowledgment, neither was entitled to record; and, although they were duly recorded, such record was not notice of the deeds, even as against Rowland Cromelien, one of the grantors, and therefore his title was not affected or impaired. So far as the record shows, these conveyances, if entitled to be considered at all, seem to be purely voluntary, and, as defendants claim, cogent evidence of a gift of the lots by Rowland to his wife, unincumbered by any trust or agreement, from which an equity in Rowland's favor could be inferred. There is no evidence that they were given upon any understanding between the husband and wife. The legal title of record, unless these last conveyances were utterly void, remained in Amelia Cromelien, from the last-mentioned date until its extinguishment by the sale had under a decree of foreclosure in the suit of David Robinson against Rowland Cromelien and Amelia Cromelien, in the circuit court for the county of Wayne, in chancery, upon a mortgage executed by Rowland and Amelia covering the property in question. The deed under this foreclosure sale was executed by the circuit court commissioner upon the 30th of August, 1867, to Edmund Hall, who bid in the premises at the sale, and April 4, 1868, conveyed the same to Daniel Hand by quitclaim deed, for the consideration of \$3,629. The mortgage foreclosed by this decree and sale was executed to W. H. Willock, February 15, 1856, and by him assigned February 18, 1856, to David Robinson, the complainant in the foreclosure suit. On March 24, 1858, suit to foreclose the Robinson mortgage was begun, and George E. Hand, a reputable attorney and counselor, of Detroit, was retained to defend, and his partner, Edmund Hall, prepared the answer to the bill. This litigation was not brought to a close until, as stated, August 30, 1867. During its progress a voluminous correspondence running through all these years was had between Hand and Rowland relative to the defense of the cause, the payment of taxes upon the property, its condition, and the interest of Rowland in it; Hand repeatedly notifying Cromelien that the taxes were accumulating, and that Amelia, Rowland's wife, had the legal title to the lots. April 25, 1857, Rowland and Amelia Cromelien united in the sale and conveyance to George H. Parker, of Detroit, for the sum of \$4,500, of another lot in the city of Detroit, and received in part payment of the consideration the bond of Parker, secured by a mortgage on the lot conveyed for the sum of \$2,500. These securities were left in the possession of George E. Hand, and, as the bill claims, under instructions by Rowland to Hand to apply the proceeds of the securities to the payment of the taxes assessed, and to be assessed, upon lots 6, 7, and 8 of the military reserve. The bill alleges that it had been arranged between Parker and Rowland Cromelien that Parker was to pay such taxes by way of satisfaction of the mortgage, and would have done so but for the wrongful acts of George E. Hand, set forth in the bill. It also appears that on the 18th of July, 1854, prior to the execution of the mortgage to Willock, Amelia had executed and

delivered to Rowland a power of attorney, whereby she authorized him to sign checks, notes, and drafts in her name with general powers, and that said power was, by its terms, irrevocable for the period of 10 years.

The bill further charges that in 1859 an alienation had arisen between Rowland and Amelia, and they were living apart, Amelia in New York City, and Rowland in St. Louis, Mo.; and that, this fact coming to the knowledge of Hand through his professional relation to Rowland, Hand set about availing himself thereof to deprive Rowland of his said title. The specific wrongful acts charged against George E. Hand in furtherance of this purpose, and in violation of his professional duty as a solicitor, which constitute the gravamen of the bill, are, briefly stated, the following: (1) The payment to Amelia of the moneys arising from the sale of the lot to Parker, instead of applying the same in payment of the Robinson mortgage and taxes, or returning the bond and mortgage to Rowland. (2) Hand's conspiring with Amelia to deprive Rowland of the land in controversy, and divide the proceeds with her. (3) To promote the object of said conspiracy with Amelia, and to prevent Parker from paying the taxes on the lands in controversy, turning over the Parker bond and mortgage to Amelia. (4) In furtherance of the conspiracy, keeping Rowland in ignorance of the revocation of Amelia's power of attorney, and the recording of said revocation, and concealing the delivery and collection of the Parker bond and mortgage from Rowland, who did not learn of these acts until 1867 and 1868, respectively. (5) Fraudulently taking advantage of Rowland's ignorance of the delivery to Amelia of Parker's bond and mortgage, whereby George E. Hand was able to secure for Daniel Hand a large number of taxes, leases, and tax titles on the lots in which the trust is claimed by the bill. (6) Procuring the substitution of George A. Willcox as solicitor for Rowland in the Robinson foreclosure suit, March 24, 1860, in order to make it appear of record that George E. Hand was not Rowland's solicitor, while continuing to manage said suit on behalf of Rowland in different capacities. (7) Keeping the substitution of George A. Willcox from the knowledge of Rowland until after the termination of the Robinson suit. (8) During the pendency of said suit, writing to Rowland in such a way as to lead him to believe that Hand was still his solicitor. (9) From 1861 to 1868, dissuading Rowland from coming to Detroit, as he desired. (10) "Keeping Rowland in ignorance as aforesaid," and meanwhile allowing the lots to be sold for taxes, and bidding the same off at tax sales through George A. Willcox, and causing the title to be conveyed to Daniel Hand for the purpose of disabling Rowland from protecting his rights therein. (11) Concealment by Hand of the fact that he had obtained these titles and of his possession of the certificates, and withholding the same from record. (12) Fraudulently, and to achieve the object of his conspiracy, inducing Rowland to procure the assignment to himself at an expense of \$600 of a mortgage executed January 28, 1856, by Rowland, of said lots to Alexander McKay, for \$10,250, and persuading Rowland to record the assignment by McKay to Rowland of this mortgage. (13) That Hand procured additional tax titles to be used against Rowland, and contrived to have them paid for out of the proceeds of the land when sold on foreclosure. (14) After the decision, April 23, 1867, by the supreme court of Michigan, of the appeal in the case of Robinson v. Cromelein, 15 Mich. 316, advising Rowland that no sale could take place under the decree, which allowed him until August 1, 1867, to pay until the claims against the land were paid off, thus preventing Rowland from paying the amount of the decree and preventing the sale. (15) That Hand, upon the decision of the supreme court, departed for Europe, and there remained until November, after the sale of the property under the foreclosure decree, misleading and keeping Rowland in ignorance by letters, and preventing him from protecting his interest; that the land was then worth \$40,000, and Rowland could have readily raised the incumbrances upon it. The lots were struck off upon the foreclosure sale August 30, 1867, to Edmund Hall, for \$3,629. Hall, on the same day and for the same consideration, conveyed the lots to Daniel Hand, who had paid the additional sum of \$1,681.73 for taxes and tax titles thereon, including interest. (16) The concealment by George E. Hand from Rowland of the fact of the foreclosure sale, and of the tax titles held by Daniel Hand; his

failure to record the foreclosure deed and the deed to Daniel Hand, and to take out deeds or leases on tax certificates until March, 1868. (17) For the purpose of keeping Rowland in ignorance of the sale, Hand failed to enter an order confirming the sale, and left Rowland's tenant in undisturbed possession. (18) Taking a power of attorney, March 18, 1868, from Daniel Hand, empowering him to defend suits, etc., on learning that Rowland Cromelien was about to come to Detroit. (19) Acting as agent of Daniel Hand, George E. Hand, in March and April, 1868, took out 16 tax deeds and leases on said certificates, and April 17, 1868, recorded them, together with the foreclosure deed and Hall's deed to Daniel Hand; also, George E. Hand's refusal to recognize Rowland as having any rights in the premises, and his claim that Daniel Hand held the absolute title as against him.

The bill also alleges "that, about the time Rowland came into contact with George E. Hand, he (Rowland) had been misled into believing that the deeds from Amelia and himself to Seymour, and from Seymour to himself, were void, and vested no title in said Rowland"; adding: "And although said Hand well knew such deeds to be valid, and that said Rowland was vested with the legal title to said land, he kept said Rowland in ignorance of his rights, and thereafter took advantage of such ignorance to deprive him of these rights." It is not charged that Hand misled Rowland as to the effect of the Seymour conveyances, nor is any person accused of inducing the alleged erroneous belief, but the extent of Hand's fault as to Rowland's supposed error is his failure to correct it. After the sale of the lots under the Robinson decree to Edmund Hall, and his conveyance to Daniel Hand, an accounting was had between Daniel Hand and Amelia Cromelien as to the amount due Daniel Hand for taxes upon the property, paid by him, and for tax titles thereon which he had purchased; and the sum of \$26,816.72 was found to be due to Daniel Hand. Amelia Cromelien assented to this result, and Hand, on his part, agreed to convey the land to Amelia upon her repaying him that sum, with interest. The bill claims that much less than this amount was due Hand, and that by this settlement with Amelia, which the answer pleads was a full adjustment of all matters of accounting of difference between Daniel Hand and Amelia, Hand obtained the sum of about \$15,000 in excess of what was fairly due him for his advances. Daniel Hand and his grantees have been in possession of the premises, claiming title under the foreclosure sale, since August 30, 1867; and Daniel Hand's grantees still claim and hold the property.

On the 5th of August, 1878, Amelia having failed to pay Daniel Hand the sum secured upon the property, the latter filed his bill in the circuit court for the county of Wayne, against the administrator, devisees, and legatees of Amelia Cromelien, to foreclose his mortgage upon the property, and for an accounting and sale. The suit proceeded regularly to a hearing and decree, and on the 15th of September, 1879, the sum of \$52,064.92 was decreed to be due to Daniel Hand, and the land ordered to be sold. April 15, 1880, the mortgaged property was sold and bid in by Daniel Hand for \$54,500, and a deed of the premises was executed to him. The bill recites certain conveyances of part of the property, made by Daniel Hand after his title had been perfected by the foreclosure; among others, one to the defendant Freud for \$60,000, upon which there is owing and secured by mortgage the sum of \$50,000. It is the complainant's claim that the whole amount due Daniel Hand, April 21, 1885, for moneys advanced by him to Amelia Cromelien, and for the benefit of the property, with the interest thereon, was less than \$19,644.51, and charges that Daniel Hand had received, after his acquisition of the property by the foreclosure sale of 1880, large sums of money by way of rents and profits, for which he ought to account. The bill prays an accounting, and that Hand be held as trustee for the sums alleged to be due from him for the rents and profits of the property, and that the amount due upon the Freud mortgage be declared to be equitably the property of the complainant, and that the mortgagor be decreed to account and pay over the same to complainant.

On May 13, 1868, Rowland Cromelien filed his bill of complaint in the circuit court for the county of Wayne, in chancery, against Amelia Cromelien, his wife, George E. Hand, and Daniel Hand, alleging his purchase

from the city of Detroit of the premises in controversy in this suit; that the fee therein had remained in his wife; that the premises had been sold under foreclosure of the Robinson mortgage; and that, during the proceedings in said foreclosure case, a large amount of state and county taxes had been levied and assessed upon the property from the year 1856 to 1864, both inclusive, and also that a large amount of taxes were levied and assessed upon the property to defer contingent expenses of the city of Detroit; that the premises were sold for unpaid taxes, and the titles acquired by Daniel Hand; and that tax deeds were issued to him, conveying said premises, and also leases issued by the city of Detroit, for the unpaid taxes assessed for city purposes for several years. The bill charges that George E. Hand had caused said several tax titles, leases, and deeds to be executed to Daniel Hand, his brother, who claimed absolute ownership of the property, but was, in fact, a mere money lender for the purpose of securing investments for the payment of said taxes, and that the moneys advanced by said Daniel Hand were, in fact, the moneys of George E. Hand, Rowland's solicitor in the Robinson foreclosure case, and that Daniel Hand acted in acquiring the title under said tax deeds in the place of and for the said George E. Hand. The bill further avers that Amelia had frequently admitted that the premises in controversy were the property of Rowland, but, for the purpose of cutting off his equitable interest therein, she had permitted said tax titles to accrue and said tax conveyances to be made to the said Daniel Hand, who took the titles thus conveyed, with all the knowledge in relation to the premises possessed by said George E. Hand, and with the same rights and duties as if said conveyances had been executed to George E. Hand himself; that there had been no communication between Amelia and the said Daniel Hand, who had made his advances entirely upon the representations and request of said George E. Hand. There is no charge of any malversation by George E. Hand further than that given above.

January 15, 1869, the bill was dismissed, for failure to file security for costs. September 3, 1869, upon the complaint of Rowland Cromelien, George E. Hand was arrested, and brought before the police justice of Detroit, charged with deceit and collusion in his professional capacity as solicitor of record for Rowland in the foreclosure case. It being shown that Hand ceased to be solicitor of record in said case for Rowland in 1860, the complaint was dismissed by the police justice, September 18, 1869, and Hand was discharged. On the same day, Hand caused the arrest of Rowland Cromelien upon a *capias* in a suit for malicious prosecution; and Rowland was held to bail on said charge. February 9, 1870, the suit was terminated by a verdict for \$100 in favor of Hand. Rowland Cromelien died February 2, 1873; and April 22, 1873, his will, executed September 11, 1868, was duly probated in the supreme court for the District of Columbia. Among other provisions, "it devised to Sarah Ferguson, whose name before marriage was Sarah M. Glory, all the interest I have on the property at Detroit, state of Michigan, now prosecuted by Mr. D. E. Holbrook, my counselor at said place against my wife, Amelia Cromelien, for moneys paid and advanced by me since 1833; and, in the event of the demise of said Sarah Ferguson, then the same interest as now claimed by me for her children, whose names are Rowland, Henry, John, and Sarah Ferguson," etc. The suit referred to in this clause of the will, as prosecuted by Mr. Holbrook, was the bill the substance of which has been just stated. This will was probated in Wayne county, Mich., January 6, 1891, preparatory to the bringing of this present suit, which was filed September 16, 1891. Amelia Cromelien died, testate, in New York, June 13, 1877, where her last will and testament was probated December 18, 1877, devising her estate, real and personal, except certain legacies, to the children and grandchildren of Rowland Cromelien and hers. George E. Hand died August 30, 1889, having for several years prior to his death been mentally incompetent and under guardianship.

In dismissing the bill, Judge SWAN said, in part:

It will be seen from the foregoing statement of the facts that the foundation of the bill is the supposed title of Rowland Cromelien to the property

in controversy. Unless the proofs establish this contention in behalf of complainant, the entire theory and foundation of the complainant's case utterly fails. It is insisted in his behalf that as the title to the property in question was acquired from the city of Detroit in the name of Amelia Cromelien, the wife of Rowland, prior to the adoption of the Revised Statutes of 1846, which first enacted that no resulting trust should arise in favor of a party paying the purchase money of realty, the title to which was taken in the name of another, unless evidenced by writing, it is open to complainant to prove such resulting trust by parol. The circumstances relied on in support of the claim that the conveyances to Amelia of these lots in 1836, by the city of Detroit, created a resulting trust in favor of Rowland, is the fact that installments of the purchase money are credited to him upon the books of the city of Detroit, and the payments of such installments acknowledged to have been received from him by the proper city official; that Rowland, in his correspondence with George E. Hand, repeatedly asserted that the purchase money was furnished by him; and that he owned the property, and had merely put it in his wife's name for convenience, and to accomplish several objects which he then had in view. Repeated declarations of this sort by Rowland are found in this correspondence, but proof is entirely wanting of any other fact or circumstances from which it can be inferred or reasonably argued that Amelia held the property in trust or upon any condition or agreement whatsoever with her husband. While the statute forbidding resulting trusts unless evidenced by writing was not in force until 1846 (*Trask v. Green*, 9 Mich. 358), such trusts, though alleged to have arisen out of transactions prior to that year, must be clearly proven, especially after so great lapse of time and the death of the principal actors in the affair, and of all the witnesses who could have been cognizant of the facts attending the conveyance and the purpose for which it was given. * * * *Waterman v. Seeley*, 28 Mich. 77; *Brown v. Bronson*, 35 Mich. 415; *Palmer v. Sterling*, 41 Mich. 218, 2 N. W. 24; *Reynolds v. Morris*, 17 Ohio St. 510; *Edgerly v. Edgerly*, 112 Mass. 175.

Upon familiar rules of evidence, the assertions of Rowland of his ownership of the property are declarations in his own interest, which cannot avail in proof of a title. Amelia claimed that the property was purchased with her own means, derived from her father's estate. Whatever weight is given, therefore, to the declarations of Rowland concerning his title to the property, must also be accorded to the denials of his wife and the assertions of her own title. The necessity of clear proof of the trusteeship of the wife in favor of the husband is also recognized in *Prevost v. Gratz*, 6 Wheat. 481; *Slocum v. Marshall*, 2 Wash. C. C. 397, Fed. Cas. No. 12,953; *Smith v. Burnham*, 3 Sumn. 435, Fed. Cas. No. 13,019; *Hopkins v. Grimshaw* (U. S. Sup. Ct., Oct. Term, 1896) 17 Sup. Ct. 401. * * *

If, by any possibility, it could be successfully claimed that a trust resulted in favor of Rowland under the conveyance by the city of Detroit to Amelia, such trust was terminated by their joint action in conveying the property to Seymour, and his reconveyance to Rowland, by which Rowland became vested with the complete legal and equitable title. There is absolutely no evidence that Amelia held whatever title she claimed in the lands under any trust created after 1836, the date of the conveyance from the city of Detroit. If the deeds of Rowland to Washington Cromelien, and of Washington to Amelia, were valid, either per se or by reason of the requisite possession and claim of title held under them by Amelia and her grantees, they are fatal to complainant's bill. It is the claim of the complainant that the deed to Washington Cromelien and his deed to Amelia were not so executed and acknowledged as to be entitled to registry, and, indeed, were wholly void. The defect charged to exist in the conveyance to Washington from Rowland and Amelia is the lack of the clerk's certificate required by the law of Michigan then in force (Laws 1840, p. 166). Section 2 of the act referred to required that deeds of land in this state, when executed in any other state or territory, should have a certificate of the proper county clerk attached to the instrument that such deeds were executed according to the laws of such state or territory. The certificate of acknowledgment to this deed reads:

"State and County of Wayne—ss.: On the 4th day of April, 1842, before me came Rowland Cromelien and Amelia, his wife, known to me, respectively, to be the individuals described in and who executed the within conveyance, and acknowledged before me that they executed the same. And the said Amelia, being privately examined by me, apart from her husband, acknowledged that she executed the said conveyance freely, and without any fear or compulsion of her said husband.

"D. Hobart, Commissioner of Deeds."

The omission from the clerk's certificate pointed at is the absence of the affirmation that the deed was executed according to the laws of New York. It is urged that this invalidates the record, and is not cured by section 3 of the act of 1861 (2 How. Ann. St. § 5726), which provides: "No deed of land situate in this state, heretofore or hereafter executed, shall be deemed defective by reason of any informality or imperfection in the certificate of acknowledgment if it shall sufficiently appear by such certificate that the person making the same was legally authorized to take such acknowledgment, and that the grantor or grantors named in such deed were personally known to him and that he or they personally appeared before him and acknowledged such deed to be his or their free act; and if such deed was executed out of this state, it shall be sufficient if the certificate under the seal of office of the clerk, or other proper certifying officer of the court of record of the county or district within which such acknowledgment was taken, in cases where any such certificate was required sufficiently to show that the person before whom such acknowledgment was taken, was, at the date thereof, such officer as he is therein represented to be; and whenever such deed has been recorded in the office of the register of deeds of the proper county, such record shall be effectual for all purposes of a legal record, and the record of such deed, or a transcript thereof, may be given in evidence as in other cases. Provided, that nothing in this section or in the preceding two sections contained shall impair the rights of any person under a purchase heretofore made in good faith and on valuable consideration."

We are not called upon to consider any other defect in the acknowledgment or certificate than that mentioned. The deed without the acknowledgment was valid *inter partes*. *Brown v. McCormick*, 23 Mich. 215, 219. * * * In *Healey v. Worth*, 35 Mich. 166, it was held that a deed to which no clerk's certificate was attached at the time it was recorded was cured by the act of 1861 (2 How. Ann. St. §§ 5726, 5727), the court saying: "We think all such defects are clearly within the letter and spirit of this statute." There is no force, therefore, in the objections urged to the deed to Washington Cromelien. Its effect was certainly to vest in the grantee the title to the property it conveyed. If, by reason of any informality in Washington Cromelien's conveyance to Amelia Cromelien, it failed to pass the title to her, the conveyance to Washington certainly clothed him with the title, and deprived Rowland of his estate therein. If such was its effect, the complainant, as the administrator of Rowland, has no concern in the disposition of the property, and no interest therein which entitles him to maintain this suit.

Passing now to the deed from Washington Cromelien to Amelia, the objections are found to be more serious. That instrument was acknowledged before a commissioner for the city of New York, authorized to take acknowledgments of deeds to be recorded in the state of New York. In addition to this defect, the certificate recites as follows: "* * * Appeared Washington Cromelien, and acknowledged that he had executed the within instrument; and at the same time appeared before me Joshua B. Wolf, who, being by me duly sworn, deposes that he resides in the city of Philadelphia, and that he knows the person making the said acknowledgment to be the person who executed the said instrument, which is to me satisfactory evidence thereof." It is well objected that Griscom, the commissioner whose acknowledgment is appended to the deed, had no authority to take such acknowledgment under the laws of Michigan. If this were the only evidence of Amelia's title, it must fail, but the proofs are abundant that Rowland Cromelien repeatedly and deliberately acknowledged that he had conveyed this property to his wife. As late as 1868, he had filed his bill of complaint in the circuit court for the county of Wayne, to compel, among other things,

a reconveyance from her. Long before that time, he had repeatedly admitted his wife's title to the property. On July 18, 1854, 13 years after the deeds of Rowland and Amelia to Washington and the latter's deed to Amelia, Rowland obtained from his wife a power of attorney irrevocable for 10 years for her and in her name to lease any or all of her lots in Detroit for a term of not less than 21 years, to execute a mortgage for not exceeding \$5,000 upon the Michigan avenue and Wayne street lots, and generally to do all and every act or thing that she could do if personally present. No later or other conveyances of the property to Amelia than those from Rowland and Washington Cromelien are proved, and the inference is irresistible that, in accepting this power of attorney from his wife, and in his frequent admissions of her ownership, Rowland acted with the full knowledge of the fact that the legal title was in his wife, and that he intended to recognize the Washington Cromelien deed, and did thereby recognize and admit it; for otherwise the power of attorney would have been purposeless and useless, and his admissions would have been without motive. This instrument was executed and recorded long before 1857, when Rowland became acquainted with George E. Hand, and before he had had business relations with him, or even knowledge of his existence. Whatever authority Rowland exercised over the property after the execution of this power must be referred to the instrument, and not to any other source; for, under Rev. St. 1838, p. 344, both Rowland and Amelia being then nonresidents, the latter's interest was absolute and alienable by her alone, and she might lawfully "make and execute any deeds and other instruments in her own name, and do all other lawful acts that might be necessary and proper to carry into effect the powers so granted to her [by the statute]." By the act of 1844 (Sess. Laws 1844, p. 77, re-enacted in Rev. St. 1846, p. 340), "any real or personal estate which may have been acquired by any female before her marriage, * * * or to which at any time after her marriage she be entitled by inheritance, gift, grant or devise, and the rents, profits and income of any such real estate, shall be and continue the real and personal estate of such female after marriage to the same extent as before marriage." * * * Under these statutes and the act of 1855, Amelia's right to come into the state and convey the fee was unquestionable. *Tong v. Marvin*, 15 Mich. 60. The fact that she gave her husband this power of attorney in no degree qualified her ownership of the premises. The management of the wife's property by the husband is too common an act to detract in the least from the wife's title, and there is no evidence that the title conveyed by the Washington Cromelien deed was limited by any trust or obligation whatsoever in favor of Rowland. In September, 1859, Amelia revoked this power of attorney; and since that time no act of Rowland's is shown questioning her absolute ownership until the filing of his bill of complaint in the circuit court for the county of Wayne, May 13, 1868, in which he alleges positively "that the fee in said premises has, until lately, remained in the said Amelia," although he says he had managed, controlled, and used it as his own for over 25 years. The phrase "until lately," had reference to the divestiture of Amelia's title by the sale of the premises had under the foreclosure decree rendered in the suit of *Robinson v. Cromelien*, in 1867, *supra*. Rowland also alleges in his bill the execution of the power of attorney in 185-, by Amelia, authorizing the incumbering of these lots, and he prayed that Amelia might be compelled to execute a good and sufficient deed of the premises to him, and that he might be declared to be the owner thereof by reason of having paid the original purchase price therefor. * * *

The power granted by Amelia, so far as it relates to the premises in suit, "is to execute a mortgage not exceeding \$5,000 on my lots known and described as bounded on Michigan avenue and Wayne streets." This recital of her ownership, if not conclusive against Rowland by reason of his acceptance and acts under the power, is an unequivocal admission by him of her title, which can only be referred under the proofs to the effect of the Washington Cromelien deed, as that was the last conveyance which he had made to her. *Bursley v. Hamilton*, 15 Pick. 40; *Bruce v. U. S.*, 17 How. 437, 442; *Carver v. Jackson*, 4 Pet. 1, 86. These facts alone should suffice to create an equitable estoppel against his right to disturb her possession, or that

of her grantees, who had dealt with the property upon the faith of his conveyance to Washington Cromelien, and the latter's deed to Amelia, and Rowland's repeated recognition of the title it purported to convey. *Kirk v. Hamilton*, 102 U. S. 68.

The proofs further show that Rowland acted under this power of attorney, and in the name of Amelia, by himself as her attorney, executed and acknowledged a lease of the premises to one Champ, November 23, 1855. The covenants run to Amelia, her heirs and assigns. No technical defect in the attestation or acknowledgment of the deeds under which Amelia claims title ought under such circumstances to be permitted to defeat the title intended to be conveyed. *Cherry v. Heming*, 4 Exch. 633. There is no evidence that Rowland ever repudiated the deed to Washington Cromelien, or questioned that from Washington to Amelia. While he frequently asserts in his correspondence with Hand that the land was held by his wife for him, and denounces her for asserting title thereto, he never at any time assailed the genuineness of the deeds under which she claimed or questioned their validity in any particular.

At Rowland's request, George E. Hand, on April 4, 1860, sent him a compared copy of the abstract of title of these lots, the receipt of which Rowland acknowledged June 22, 1860. This reminded him, if he needed any reminder, of the sources of his wife's title, and necessarily also, as there was no conveyance from her to himself, that the fee still remained in her. Rowland had had and copied the original abstract as early as February, 1856, as shown hereafter. He was also repeatedly informed by Judge Hand, in their correspondence from 1857, until long after the foreclosure decree and sale under the Robinson mortgage in 1867, both that Amelia claimed the property, and that the records in the office of the register of deeds supported her claim. It would extend this opinion to too great length to cite all of the numerous instances which abound in the record of Hand's mention of this fact to Rowland. Rowland's own references to it in his correspondence again and again recognized his wife's title. July 20, 1863, he wrote Hand in reference to this subject, *inter alia*: "I now want you to get the property so shaped, and for which we have time, to get said title of property into my name back again where it properly belongs. * * *" And writing of the McKay mortgage, which was a fictitious incumbrance he had placed upon the property to effect certain purposes of his own, he says: "Dear Sir: I now see that you have your ideas, and I believe know from me why I have placed the mortgage to McKay on record, and that the same is without consideration; that its real object is only to bring about a change of the title of that property through my two minor boys." * * * His project, stated in the same letter, was to use this McKay mortgage by having Hand advertise its foreclosure in obscure newspapers of literary or religious character, in Lansing and Detroit, so as to satisfy the requirement of the law by its advertisement in two newspapers; and, after the disclosure of his project he added: "Now, when the matter is once done in this shape, all trouble is removed against myself and the title in me. I then would have no difficulty in negotiating or selling here or elsewhere, subject only to the right of dower," etc. This proposition Hand promptly repudiated, and followed this November 6, 1863, by reminding Rowland that, as he was counsel for Mrs. Cromelien as well as himself, it was not proper for him to listen to any proposal looking to the prejudice of her interest in these lands. February 4, 1864, Rowland admits in a letter of that date to Hand that, the fall his wife visited Detroit, she wrote him, quoting his language, "properly speaking, a maniac's letter, therein advising me, and notifying me of no more right in said property," etc. The visit of Mrs. Cromelien referred to was in 1859. In the same letter, he suggests a scheme to get an order of sale from the court of chancery, and place the title of the property by buying it in where it properly belonged, "with no prejudice to Mrs. C. by me, after which we can sell the property," etc. In a long letter addressed to Hand under date of May 30, 1864, after lavishing a wealth of invective in denouncing his wife, he says: "Such is the mother that trains and learns her children how to treat their father, in whom I place all on record, but that is its object to wean them from my parental affections, so that she and

others may get the property." March 31, 1865, in answer to Rowland's letter requesting Hand to accept a \$300 order to be paid from the proceeds of the lots, Hand wrote, declining for several reasons, among others saying: "The fee or title of the land is in your wife, and no moneys which might remain from the sale of the lands after the Robinson-Bell decree shall be satisfied, unless with the consent of Mrs. Cromelien or an order from the court." Again he says, in the same letter: "Upon the record, that land belonged to Mrs. Cromelien, and by the laws of Michigan she had the exclusive right to sell and dispose of the land. The defense (of the mortgage suit), therefore, had special reference to her lands and her interest; and, if there was to be any misunderstanding between Mrs. C. and yourself, my natural and proper position, if I could not act for both, was to stay by the land I was defending and the owner of it as appeared by the records." November 13, 1865, Hand again writes him: "You will also bear in mind, while looking at the real position of the land, that the fee is in Mrs. Cromelien, subject to the Robinson mortgage and McKay mortgage, the real amount subject also to the Champ lease, said incumbrances, and the most amount of tax lien; and, when all these should be satisfied, the residue then belongs to Mrs. C. Such is the real state of the case, and it can be no advantage to you to blind your eyes as to the real state of the case." Replying December 1, 1866, to a visionary scheme proposed by Rowland to advertise and sell the land in lots, Hand again informs him that "the record shows the title to the land to be in your wife, subject to the Bell mortgage." Replying to this letter under date of December 10, 1866, Rowland acknowledges that he placed the title of the property in her name, though claiming that his purpose was to secure the use and benefit of both himself and wife in so doing. March 30, 1866, in a lengthy letter to George E. Hand, in reference to the relations between himself and his wife and the title to the property, Rowland says: "That said property was mine, as controlling it, the record of your city of 1836 will show that; and so, in about 1850, when I wanted to use it in business, she redeeded; and when I was done with it, for safe-keeping, I replaced it in her name." * * *

In view, therefore, of this overwhelming mass of evidence establishing the title of Amelia, the lack of anything whatever except the assertions of Rowland, made after he had alienated his wife's affections by contracting another alliance, and which, as has been said, are merely declarations in his own interest, uncorroborated by the slightest acknowledgment by Amelia of his claims, but repudiated constantly by her and by her acts, and the dominion which she exercised over the property, as well as her denials that his money had purchased it, it is impossible to find any foundation in the proofs for the claim of interest made in the right of Rowland, either by reason of his last will and testament or otherwise; and it would be sufficient to rest the determination of the case upon this ground alone, as it deprives the complainant of all title to relief. Other defenses, however, clearly warrant and require the same conclusion. As early as 1859, Rowland knew that his wife claimed the property in hostility to him, she "advising and notifying him of no more right in said property," as his letter of February 4, 1864, admits. He was again and again informed by Hand that she persisted in this claim, and asserted her absolute title to it; that taxes were accumulating upon the property, some of which she paid, and some of which were met by advances obtained in her interest from others. He knew, too, that Amelia, after the McKay mortgage was put upon record, and because of that instrument, declined to pay further taxes or procure advances therefor. In short, he was fully informed of the condition of the property, its needs, and the danger to the title from these constantly accruing incumbrances. He remained silent and inactive, promising much, but doing nothing, except to denounce his wife for refusing to accede to his wishes, and for obstructing his scheme to divert the property to the use of the children of Sarah Ferguson, with whom he was then living. For 10 years he remained quiescent, taking no steps whatever to enforce his alleged rights or disturb his wife's possession, but contenting himself with vain endeavors to deflect Hand from his duty to Amelia by urging him to persuade her to consent to a division of the property. This alone was a sufficient recognition of her title, without

proof of the delivery of the deed. *Gould v. Day*, 94 U. S. 405, 412. Then, in 1868, 26 years after Amelia had acquired the title, and 10 years after he had declared in his letter to Hand "that no sale or man could take the land from my wife," he filed a bill in the Wayne circuit court to compel a conveyance of the property by Amelia, and for an accounting with those who had advanced money to her to preserve the property from sacrifice on the faith of her ownership, which bill he suffered to be dismissed for failure to file security for costs, although but a short time before he had asserted his ability to raise the money and purchase the property at the foreclosure sale. Except this half-hearted and feeble assertion of his alleged interest, he made no move whatever looking to the recovery of the land, or questioning her ownership. After the foreclosure sale, he made a criminal complaint, whose allegations were mainly on information and belief, charging Hand with professional misconduct, and the betrayal of his (Rowland's) interest; but this was dismissed, and Hand made it the basis of a civil action for damages against Rowland, and obtained a verdict which vindicated him. Rowland lived until 1873, without further effort or assertion of interest in this property. His wife, Amelia, survived him four years, dying in 1877. George E. Hand survived until 1889, though for several years prior thereto mentally incompetent and under guardianship. Forty-nine years after the Washington Cromelien deed, thirty-two years after express notice to Rowland of Amelia's claim, twenty-four years after Daniel Hand acquired title to the property, eighteen years after Rowland's death, fourteen years after the death of his wife, several years after Hand had become an imbecile, and two years after his death, this bill of complaint was filed. The excuses proffered for such unconscionable delay cannot avail under such circumstances. Granting that Sarah Ferguson was without means, and that Rowland in his later years was impecunious, these facts are insufficient to condone their laches. *Norris v. Haggin*, 136 U. S. 386, 10 Sup. Ct. 942; *Hammond v. Hopkins*, 143 U. S. 224, 12 Sup. Ct. 418.

Jasper P. Gates, for appellant.

John D. Conley, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

PER CURIAM. This case has been very fully and satisfactorily discussed by the learned judge who presided at the circuit. His statement of the case and a part of his opinion are given above.

We find:

1. That the conduct of Rowland Cromelien in accepting and acting under his wife's power of attorney, his express admissions in the correspondence with George E. Hand, and his admissions in the bill in equity filed by him March 13, 1868, establish beyond controversy his execution of the deed to the land in question to Washington Cromelien in 1842, and that of the latter's deed to Amelia Cromelien, and make clear that the legal title to the land was in Amelia Cromelien from 1842 to the date of the foreclosure sale, in 1867.

2. That there is no evidence in the record, available to Rowland Cromelien, having the slightest tendency to show that Amelia Cromelien held the title in trust for Rowland Cromelien, or that Rowland Cromelien had any equitable interest in the land.

3. That George E. Hand was the solicitor of Rowland Cromelien merely to defend him against the claim of Robinson as to his personal indebtedness, and not with respect to any interest in the mortgaged premises; that Hand fully and explicitly repudiated, more than four years before the foreclosure, any relation of attorney and client be-

tween him and Rowland which could impose on him an obligation to preserve the interest of Rowland in the land as against his wife; and that, under these circumstances, the correspondence between Hand and Rowland defining their relations, and containing admissions and statements as to the existence of the legal title in Amelia Cromelien, were not privileged, and were admissible in favor of Hand and his representatives.

4. That certainly from 1868, when Rowland Cromelien filed his bill in equity against Daniel Hand, George Hand, and Amelia Cromelien, Rowland knew that Daniel Hand and the others repudiated any claim on his part of an interest in the land as client or cestui qui trust, and no circumstances are shown which will excuse the laches necessarily involved in the delay of 23 years in thereafter filing the bill herein.

5. That the bill was properly dismissed in the court below—First because the claim of Rowland Cromelien's devisees is barred by laches; and, second, because, even if not so barred, the claim on the evidence has no merit in it.

The decree of the circuit court is affirmed, with costs.

VENNER v. FARMERS' LOAN & TRUST CO. OF NEW YORK.

ADRIAN WATERWORKS CO. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. November 19, 1898.)

Nos. 570, 571.

1. CORPORATIONS—REORGANIZED WATER COMPANY—RIGHTS OF BONDHOLDERS.

A new corporation was organized to succeed an insolvent water company, and to acquire its property and franchises, which it did through a purchase at foreclosure sale, issuing its bonds, some of which were exchanged for the bonds of the old company. The intervening petitioner, who was the organizer and practically the owner of the new company, was a creditor of the old company, whose claim had been adjudged in the foreclosure suit a lien superior to that of its mortgage bonds. He became the purchaser of the property at the sale under the decree, subsequently conveying to the new company. *Held*, that the new company was legally a new and distinct corporation from the old, as to its bondholders, whose bonds, though acquired by exchanging therefor bonds of the old company, were not subject to the intervenor's lien which was presumptively discharged by the foreclosure sale, and that they were not bound by an agreement between the intervenor and the new company that his lien should continue as a first charge on the property in the nature of a vendor's lien, of which agreement they had no notice.

2. SAME—MORTGAGE COVERING AFTER-ACQUIRED PROPERTY.

A new corporation, organized for the purpose of acquiring the property and franchises of an insolvent water company through purchase at foreclosure sale, issued and sold its bonds, secured by mortgage, before the purchase of the property. The mortgage described but a small amount of property then owned by the corporation, but recited that the bonds were issued for the purpose of acquiring the waterworks property and franchises, and contained an after-acquired property clause. *Held*, that the mortgage covered the property of the old company when acquired by the purchase, without the necessity of a supplemental mortgage describing the same.

3. SAME—EFFECT OF COVENANT FOR FURTHER ASSURANCE.

An after-acquired property clause in a mortgage given by a corporation, which recites that the bonds secured are issued for the purpose of acquiring additional property, is not rendered ineffective as to such property when acquired by a covenant for further assurance, by which the mortgagor binds itself on demand to execute such further conveyances or mortgages as may be necessary to carry the objects of the mortgage into effect.

4. SAME—VENDOR'S LIEN.

An after-acquired property clause in a mortgage made by a corporation can only take effect as to property subsequently acquired by the mortgagor subject to a vendor's lien thereon, which is valid as against the mortgagor, unless there are reasons which render the enforcement of such lien inequitable as between the vendor and the mortgagees.

5. SAME—ESTOPPEL TO ASSERT LIEN.

A creditor of a water company whose claim had been adjudged in foreclosure proceedings a superior lien to that of its bondholders organized a new company to purchase its property and franchises. He was in fact the owner of all of its stock, and received the entire issue of its bonds, made to effect the purchase of the property, and secured by a mortgage reciting such purpose, and containing an after-acquired property clause. These bonds he sold and exchanged for bonds of the old company on representations that they were good securities, and would constitute the first lien upon the property. He purchased the property at the foreclosure sale, and conveyed it to the new company. A portion of the proceeds of the bonds he diverted to unauthorized purposes. *Held* that, as against the bondholders, he could not assert a vendor's lien on the property for the amount due from the old company which was applied towards the purchase at the foreclosure sale, and, as he claimed, had never been repaid.

6. SAME—BONDS—PAYMENT OR PURCHASE OF COUPONS.

In order to constitute a sale rather than a payment of coupons from the bonds of a corporation, which by the mortgage are preferred over the bonds themselves, the holder must have intended a sale; and where they are cashed by a banker having an interest in maintaining the credit of the corporation, and the amount is received by the holder in the belief that the coupons are being paid, they will be treated as paid and canceled.

Appeals from the Circuit Court of the United States for the Eastern District of Michigan.

This case is an appeal from a decree dismissing the intervening petition of the appellant, Charles H. Venner, filed in a mortgage foreclosure proceeding, wherein the Farmers' Loan & Trust Company was complainant, and the Adrian Waterworks Company was sole defendant. The object of the foreclosure suit was to enforce a mortgage made August 1, 1888, by the waterworks company to the Farmers' Loan & Trust Company, as trustee, to secure an issue of 200 bonds of \$1,000 each, with interest coupons maturing semiannually. There was default in payment of interest, which precipitated the payment of the principal. Venner intervened in this suit for the purpose of asserting a claim of lien against the property of the waterworks company, superior to the lien of the mortgage, being foreclosed. The averments of his petition were substantially as follows:

(1) That in 1883 the municipal council of the city of Adrian, Mich., in pursuance of chapter 84 of Howell's Annotated Statutes of Michigan, passed a resolution declaring that it was expedient to have constructed works for supplying the city with water, but that it was inexpedient for the city to build such works. Thereupon, one Solon L. Wiley and his associates organized a corporation, in pursuance of the authority conferred by the statute recited above, for the purpose of supplying said city with water, called the Adrian Michigan Waterworks, hereafter called the "Old Company." The said company, after due organization and the acquisition of the supposed necessary site, made a mortgage upon its property to secure means to carry

out its purposes by an issue of 7 per cent. bonds, aggregating 145 of \$1,000 each, interest payable semiannually, with the ordinary provision for foreclosure in default of payment of either interest or principal. The trustee in this mortgage was the Boston Safe & Deposit Company. It is then averred that this old company entered into a contract with the city of Adrian to supply it with water. In the performance of this contract, bitter disputes arose between the company and the city, which resulted in a supplemental contract, made in November, 1887. It is then averred that no interest was ever paid on the bonds of said old company, and that in March, 1888, the trustee under the mortgage instituted foreclosure proceedings in the circuit court for the Eastern district of Michigan, and took possession, as mortgagee, of the property and works of the company, and continued to operate the same, and collect rentals and water dues from the city of Adrian and individual consumers until final foreclosure sale, in 1891. Petitioner then charges that neither the said old company nor the said mortgagee in possession had the means to make the extensions and improvements necessary to carry out the supplemental contract with the city, and that he was applied to, to furnish the money, and did supply the money, and procured and constructed the necessary plant, machinery, and reservoirs, "under an arrangement with the said Boston Safe & Deposit Company," by which the money so supplied was to be a preferential claim in the said foreclosure proceedings, and first paid out of the proceeds of sale, and by which the costs of all such additions and improvements were to be a first lien, not only upon the additions and improvements, but upon all the property of the said old company, in preference to said mortgage so being foreclosed. It is further averred that this arrangement was submitted to the said circuit court, and was approved and sanctioned by a decree of date November 6, 1890, ordering a sale of said mortgaged property, including the additions and improvements made by said Venner, and that out of the proceeds of sale the moneys so expended by said petitioner should be paid in preference to the claims of the mortgage bondholders. The cost of the said Venner plant, as fixed by said decree, was \$41,217.18. In addition to this, petitioner avers that he furnished "to the master in chancery in said suit about \$20,000, with which to pay taxes and other necessary expenses, which sum was also agreed between said Boston Safe & Deposit Company and this intervenor, to be also a lien prior to the said bond issue and a senior incumbrance upon said property.

The petition then proceeds as follows: "(7) Prior to the making of the said decree in the said foreclosure suit in this court, and in anticipation of the sale which would be made under it, it was determined by all parties concerned to reorganize the said mortgagor corporation, in order to refund the bonds at a lower rate of interest and to make provision to fund the interest which was unpaid, and to pay interest upon a new bond issue, which would take the place of the said former bond issue; and thereupon it was arranged by and between this intervenor and all parties concerned that he should take up and carry through the said scheme of reorganization. (8) To that end, it was arranged that this intervenor should act as trustee and agent for all parties concerned, and should buy in the said mortgaged property at the foreclosure sale in this court, and should convey it to a successor corporation, which should be organized under the said chapter 84 of Howell's Statutes, which successor corporation should issue two hundred twenty-year 6 per cent. bonds, to be exchanged for the old bonds, which were 7 per cent., issued by the original corporation to the extent of one hundred and forty-five, the remaining fifty-five new bonds of the successor corporation to be used to provide funds to pay the said overdue interest upon the issue by the original corporation, and to pay the interest upon the new bonds of the successor corporation until it should be in condition to pay interest out of earnings; and it was agreed that the said new bonds of the successor corporation should stand in the shoes of the old bonds of the original corporation with respect to being junior to the equitable lien of this intervenor for the money representing that which was supplied by him as aforesaid to make the mortgaged property of value, and to give it running power, and to enable it to perform its duties to the public, in accordance with the intent of the statute aforesaid."

It is then averred that "this scheme of reorganization was substantially

according to the reorganizing provisions of the General Statutes of Michigan"; that articles of incorporation were duly drawn and signed, with same capital stock as original corporation; that the subscribers to said capital "were mere dummies," having no intention or means to pay; and that "nothing was ever paid or intended to be paid," all parties regarding the new organization "as the same as the original"; and that no new corporation could be validly organized, no new resolution having been passed by the council of Adrian, which the petition claims was an essential prerequisite to the valid organization of any new waterworks corporation, under chapter 84, How. Ann. St. Mich. This new company was organized July 24, 1888, and was called the Adrian Waterworks Company, but will hereafter, for brevity, be called the "New Company." It is then stated that, acting upon "the theory that the successor corporation was the original corporation," a new mortgage was made, the one now being foreclosed. It is stated that the only property held by the new company when it made said mortgage was a piece of land known as the "Lawrence Land," purchased and paid for by petitioner Venner, "not adapted for waterworks, and distinct from the actual waterworks of the original corporation, and never used or intended to be used for waterworks." The mortgage thus made bears date August 1, 1888, and secured the issue of \$200,000 in bonds heretofore more specifically described. It is then averred that in January, 1891, petitioner, "acting as agent and trustee for the original and successor corporations, and for both sets of mortgagees and bondholders, thus carrying out the plan of reorganization, bid in all the said waterworks plant at the foreclosure sale by the Boston Safe & Deposit Company against the original corporation," for \$127,000, and paid for same with the securities of the old company in part, and the remainder in money, and by receipting the master for the preferential sums allowed him under the decree of sale. The securities of the old company thus used, the petition says, consisted in bonds and coupons secured by the foreclosed mortgage held by him "as trustee," having been procured in 1888 in exchange for the bonds of the new company. Two days after receiving a conveyance from the master, petitioner avers that, "to carry out the said plan of reorganization," he conveyed the said property, by quitclaim deed, to the new company. He avers that "no consideration was agreed to be paid by the successor corporation to this intervenor, and no consideration was actually paid by the successor corporation to this intervenor for the said property and franchises, because it was understood by all parties concerned that the said conveyance was a mere form to carry out the scheme of reorganization, and that the senior incumbrance of this intervenor still remained upon the said property in the hands of the successor corporation receiving said quitclaim deed. The successor corporation took the said property and franchises conveyed to it by intervenor, charged with this intervenor's equitable lien and senior incumbrance; and when the said property and franchises passed under the Farmers' Loan & Trust Company's mortgage, if they did ever pass under said mortgage, they did so pass being so charged with the said senior incumbrance of this intervenor's senior incumbrance and equitable lien."

Concerning the bonds issued by the new company, the petitioner states that the entire issue of bonds was received and disposed of by him. He says that they were placed in his hands by the new company, "to be used in the purchase of the bonds of the original corporation, or in exchange for them and the overdue interest coupons thereupon, and also for the interest on the bonds of the successor corporation, which uses absorbed the entire issue of 200 bonds; and the said bonds were so applied to the said uses by this intervenor, and by no one else, and in conformity to the said plan of reorganization." Concerning notice of the alleged agreements under which petitioner claims to have acted, the petition avers: "The said bondholders represented in this suit by the Farmers' Loan & Trust Company had full notice of all the foregoing statements in this petition of intervention—First, by their transactions with this intervenor, who received every one of said bonds from the complainant, and placed them where they are now held by exchange as aforesaid; secondly, by the provisions of the governing statute hereinbefore referred to as chapter 84 of Howell's Statutes, and particularly of section 2 and section 18; thirdly, by the recitations in the articles of incorporation

of the successor corporation hereto attached as Exhibit A; fourthly, by the recitations in the mortgage itself, executed by the successor corporation to the complainant in this cause; and, fifthly, by the decree in the said foreclosure of the Boston Safe & Deposit Company, of record in this court, in the foreclosure against the original corporation. Said notice informed said bondholders and said complainant in this suit that the said bonds must be regarded as those of the original corporation, and must be held as junior to this intervenor's incumbrance, or were otherwise wholly void, and not valid and subsisting securities in the law. But the intervenor is advised and submits that notice was unnecessary."

The claims of petitioner, as stated in an exhibit filed as part of his petition, are as follows:

Item No. 5. (Trustee.) All advanced by C. H. Venner.....	\$10,525 35
Item No. 6. (C. H. V.).....	43,738 29
<hr/>	
Includes interest to June 22d, 1891.....	\$54,263 64
Add int. at 6 per cent., June 22d to Aug. 10, 1891.....	452 20
Paid master in cash, Jany. 6th, 1891.....	12,700 00
Interest on same, at 6 per cent., to Aug. 10th, 1891.....	453 00
Paid master in cash, Aug. 7th, 1891.....	6,948 91
<hr/>	
	\$74,817 75

The prayer of the petition was that the petitioner might intervene and become a party to the suit, and that the said Farmers' Loan & Trust Company and the Adrian Waterworks Company should be required to answer and defend his said claims, and that his claims should be declared a lien, superior in rank to that of the mortgage. Petitioner was admitted as a party, and both the Farmers' Loan & Trust Company and the Adrian Waterworks Company answered. The answer of the mortgagor company conceded the claims of intervenor, and admitted the truth of all his averments. The Farmers' Loan & Trust Company, the mortgage trustee, put in issue every substantial averment, denied any agreement whatever with petitioner, and all notice of his claim to either itself or the bondholders secured under the trust to it. A vast amount of evidence was taken, and the whole case heard finally upon the pleadings and proof by the circuit court, which, without a written opinion, denied all relief to petitioner, and dismissed his petition.

Alfred Russell, for appellant, Venner.

Henry M. Campbell, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The claim of Venner is that he is entitled to priority of payment out of the proceeds resulting from the foreclosure of the mortgage made by the Adrian Waterworks Company to the Farmers' Loan & Trust Company. He endeavors to maintain his claim to a lien superior to the mortgagees—First, upon the ground that in all he did in respect to the improvement and enlargement of the old waterworks plant at Adrian, as well as in the procurement of the decree of foreclosure in the old foreclosure case against the old company, wherein his claim was given preference over the old 7 per cent. mortgage, he was acting as "the agent and trustee of the old and new company, of both mortgagees, and both sets of bondholders." When he bought the property sold under the old foreclosure decree, and conveyed it to the new company, he says he was acting still as the agent of all parties, and un-

der a distinct agreement that his expenditures in procuring the title through the old foreclosure proceedings should be returned to him, and constitute a first lien upon the property of the new company superior to the mortgage made by that company. If Venner is to be accorded a lien and priority over the mortgagees of the Adrian Waterworks, it must be either because he has shown a valid contract and agreement for such lien between himself and the mortgagees directly, or by some one authorized under the circumstances to bind them, or some implied lien in the nature of a vendor's lien, which arose out of the facts and circumstances of the transaction, and which takes precedence over the mortgage.

First. Was there any contractual lien? The claim that the new and old corporations are identical legal entities, the former being nothing more than the latter under a change of name, cannot be sustained as to third parties who are bona fide holders of the securities of the new company. What occurred was in one sense a reorganization. But the new corporation is legally a new and distinct corporation. New articles of incorporation were subscribed, and a new corporate organization perfected. That the new company was formed for the purpose and in the expectation of acquiring, through purchase, the property and franchises of the old waterworks company, and that it did finally become the owner of that property and the franchises of the old company, does not affect the distinctness of the new corporation. That bondholders of the old company exchanged their securities for bonds of the new company, does not affect the question. By such exchange they ceased to be creditors of the old and became creditors of the new. That the stock subscribed in the new company was subscribed by persons who neither expected nor were able to pay their subscriptions, was a fraud upon the public, as well as upon the creditors of that company; but it does not affect the fact of incorporation as to those who dealt with it as a corporation. Neither do we find any organic difficulty in its organization, growing out of chapter 84, How. Ann. St. Mich. The original action of the city council, in 1883, stood unrepealed when the company was organized. That conferred no monopoly upon the old company. If that company was unable to go forward and supply the city with water, we see no difficulty in a new company being organized to take over its contract and franchises in the way this company proposed to do. Neither the new company, nor its mortgagees, were parties to the old foreclosure suit, and neither were bound by the decree giving to Venner a lien or establishing his debt, unless they were under some contract and relation to Venner by which he was, in fact, their agent or trustee in all that he did in that cause, or unless the property acquired by the new company through Venner's conveyance was, at the time the title was obtained, subject to some lien in his favor, which is equitably entitled to precedence over the mortgage. The evidence wholly fails to establish the contention that Venner was the agent or trustee of either the trustee under the mortgage of the new company, or of the bondholders secured by that mortgage. That Venner advanced monies to make additions to the plant of the old company at the request of the Boston Safe & Deposit Company, under an agreement that these

additions and improvements should be added to the plant and property of the old company, and that such advances should be repaid out of the proceeds of foreclosure, may be conceded. The decree in the old case settled that, and all the parties to the suit in which that decree was pronounced are bound by that decree. But a foreclosure occurred under that decree. Venner became the purchaser at a price more than sufficient to repay himself for all advances, as well as to pay all sums entitled to priority over him, and all taxes and other charges against the property entitled to preference over the indebtedness secured under the old mortgage. It may be conceded that no part of the claim of Venner was actually paid to him in money. But Venner applied that which was due him out of the proceeds of sale, as well as that which was due to him as the "agent or trustee" for the new company, towards the satisfaction of his own bid, paying in money only such part of the price as was necessary to meet the costs and expenses of the cause and of the trustee, and that which was due to other creditors, including taxes due on the foreclosed property.

Obtaining a clear deed to the property, he at once conveyed it by a deed, which contained no warranty, and reserved no lien for his own security, to the new company. He says he made this deed as a mere matter of form, in order to carry out the original scheme of reorganization, and that "all parties" understood that the lien which had been declared in his favor by the decree of foreclosure in the old case should continue and remain a first lien, and rank superior to the mortgage lien of the new company. If by "all parties" Mr. Venner intends to include the trustee and bondholders of the mortgage of the new company, he is not supported by the evidence. Neither the trustee under that mortgage nor the holders of the bonds of the new company were consulted about any of his proceedings, and gave no consent to any of his claims, directly or indirectly. But it is said that the existing mortgage of the new company did not include the property thus deeded to the mortgagor, and that, to affect this property by that mortgage, a supplemental mortgage was necessary, which was never made. As a corollary from this, appellant says that it is only necessary to show an agreement for a lien between the new company and Venner, or such a state of facts as will give rise to an implied vendor's lien good against the new company in order to entitle him to the relief he seeks as against the property not included in the mortgage. The foundation of this argument fails. No supplemental mortgage was necessary. There is an after-acquired property clause in the mortgage, by virtue of which the property was subjected to the lien of the mortgage. That mortgage, after reciting that the object of the mortgagor was to issue bonds to raise money to buy the property and plant of the Adrian, Mich., Waterworks, and the procurement of such additional property and plant as should be necessary to enlarge that plant, sets out the resolution of the stockholders authorizing the making of the instrument, and directing that a mortgage be made "of all its property, real, personal, and mixed, income and choses in action, * * * both that which it now owns and all that which it may hereafter at any time, until the payment and discharge of the whole of said indebtedness, principal and interest, in any place, acquire."

The conveying clause of the mortgage is in accord with this direction and authority. It conveys by description certain lands, "and all its privileges, franchises, easements, choses in action, estate, property, real and personal, effects, and assets, which the said first party now has, or at any time hereafter during the existence of this mortgage acquire, whether or not the same be mentioned herein." It is true that there is a subsequent covenant for further assurance by which the grantor became bound upon demand to execute such other and further deeds, assignments, or supplementary mortgages as might be necessary to carry into effect the objects of the mortgage. No demand was ever made for such other or further conveyances. But the presence of this covenant did not defeat the usual and proper effect of an after-acquired property clause, which operates as an executory agreement, and attaches itself to the property when acquired.

But it is insisted that, if the property did pass under the mortgage under its after-acquired property clause, it did so subject to a lien in favor of Venner, to secure him as the vendor of the property, in the payment of its purchase price. If the mortgagor had no title, legal or equitable, until Venner made his deed, and the property passed under the mortgage only by virtue of the after-acquired property clause thereof, and there was a valid subsisting lien thereon for purchase money due Venner, it may be conceded that such vendor's lien would continue a prior and superior lien to the mortgage, although actually subsequent thereto in point of time. *Irrigation Co. v. Garland*, 164 U. S. 1-16, 17 Sup. Ct. 7; *Harris v. Bridge Co.* (decided at the present term of this court) 90 Fed. 322. This is the aspect of this case which, apparently, has most merit, and has been most pressed upon us as affording ground for a decree enforcing a lien in appellant's favor. The lien of a vendor is a mere creature of equity. It rests upon the principle that, when one gets the estate of another, he ought not to keep it without paying the consideration. *Chilton v. Braiden's Adm'x*, 2 Black, 458; *Gold Mines v. Seymour*, 153 U. S. 509, 14 Sup. Ct. 842. Since the implied lien of a vendor is only permitted as a security for the unpaid purchase price, it is incumbent upon appellant to show that that which is due him from his grantee, the Adrian Waterworks, is in fact the purchase price of the conveyed property, for the implied lien of a vendor will not arise out of any general indebtedness or other liability at large. 3 Pom. Eq. Jur. § 1251. Neither will such an implied lien be enforced when it would operate as a means of deception or in prejudice of good faith to those affected by it. *McGonigal v. Plummer*, 30 Md. 422.

Tested by these principles, we reach the conclusion that the consideration for the conveyance made by appellant to the mortgagor corporation does not constitute such a consideration as to give rise to such an equitable lien as should be enforced to the prejudice of the mortgagees of his grantee. This conclusion we reach chiefly by reason of the relation of Mr. Venner to the mortgagor company, and his active connection with the negotiation of the bonds of that company. In the first place, Venner and the new company, his grantee, are equitably and substantially identical. He organized it. The stock subscribers are styled by his counsel as mere "dummies," who never

intended to pay, and were not able to pay. That stock, when issued, was all transferred to him. He conceived the scheme of an issue of bonds by his company to be used in acquiring the property and plant of the old company, and certain additions to that plant, which he was then in the course of procuring, under an agreement with the mortgage trustee of the old company. Having no property which could be made the basis of a mortgage, he bought a useless piece of land for \$5,000, and conveyed it to this new child of his loins. That property, confessedly worthless for waterworks purposes, is conveyed with much flourishing of phrases touching water rights, etc., and was the sole property actually owned by the mortgagor, or described or conveyed in the mortgage to the Farmers' Loan & Trust Company, for the purpose of securing an issue of \$200,000 of the bonds of the new company. Resting only upon that as security, the bonds were worthless, and this Venner knew. Substantial security could only be given to them by using them to purchase the plant of the old waterworks company and the additional plant which he had already planned when these new bonds were issued. That this was to be the use made of these bonds appears upon the face of the mortgage. That instrument recited that \$150,000 was needed to purchase the plant, property, and franchises of the old Adrian, Mich., Waterworks, and \$50,000 to procure additional property and plant to be added to that. Turning to the original resolution, passed by the "dummy" stockholders, authorizing this mortgage, we find that this new or additional plant to be purchased is described as one in course of construction by Venner. Thus, the mortgage contemplated that these new bonds were to be used to secure a property and plant which should pass under the mortgage through the after-acquired property clause thereof so soon as acquired, and that such other and further deeds, assignments, or supplemental mortgages should be made as would give full effect to the declared purpose of securing these bonds upon the property to be thus acquired, with the proceeds of the bonds secured thereunder. This mortgage was made August 1, 1888, three years before he conveyed these identical properties to that company. All of these bonds came to Venner's hands, and were disposed of by him. He was a banker, a member of the firm of C. H. Venner & Co., engaged in business in Boston, Mass. At that time, and for some time thereafter, he stood high in financial circles. His recommendation of a bond made it "go," gave it standing, and secured buyers. He had floated the bonds of the old company, and had maintained their standing by "taking up" the interest coupons through his bank, either with his own means or that of another equally interested in maintaining their market value. Thus related to the old bonds, he undertook to negotiate the new. He says that the company placed these latter bonds in his hands, to be used in exchange for the bonds and "overdue coupons" of the old company, and to pay himself for the Lawrence land, and to provide means for the payment of interest upon the new bonds as coupons should mature, and that these uses have entirely consumed them, leaving himself unpaid for part of the cost of the property of the old company and of his additional plant.

Great weight must be attached to the substantial oneness of Ven-

ner and the new company. It will not do, under the facts of this case, for Venner to say that the new company had a right to determine the purposes to which its bonds should be applied. Any diversion of these bonds from the declared purposes of the mortgage, and to the prejudice of the purchasers of these bonds, would be in bad faith to them. Its action was his action. The circumstances under which these bonds were negotiated by Venner, and a substantial identity of Venner and the mortgagor, place both under the highest obligations to acquire, with their proceeds or by their use, the properties which, according to the resolutions of the stockholders and directors as recited in the mortgage, were to be acquired by means of the bond issue of the mortgagor company. Through the honest and faithful use and application of these bonds or proceeds, the security which the mortgage contemplated could have been acquired subject to no lien superior to the lien of the mortgage. Chief among the circumstances bringing Venner under this obligation were his representations to those who obtained their bonds from him, either by exchanging old bonds for those of the new company, or who bought such bonds outright.

To induce holders of the old bonds to give them in exchange for the bonds of the new company, he is shown by the testimony of many witnesses to have represented that they were "good bonds," resting on "good security," "were a first mortgage," and "better bonds than the old bonds." Like representations were made to purchasers, and such confidence was placed in his honor and integrity that these bonds, worthless as they were in respect to a then-existing security, were in many cases sold by him at a premium. His statement that he explained to such persons that his claim for advances then made or to be made by him, in the procurement of the additional plant, would constitute a lien superior to that of the mortgage, is unconfirmed, and is incredible. Such persons as now hold the bonds under foreclosure, who have been examined, flatly contradict him, and say that he represented the bonds as "a first mortgage" and a good security, and said nothing as to such a claim in his own favor. It may be conceded that the persons taking these new bonds are chargeable with constructive notice of all which would have appeared by an examination of the recorded mortgage. This constructive notice would not, however, defeat his liability to all who relied upon his representations, without personally seeing to the character of the security actually provided by the mortgage.

But, if the purchasers had constructive notice that the mortgagor did not, at the date of the execution of the mortgage, own any property other than the valueless Lawrence land, they also had notice that the mortgage was made for the purpose of securing bonds to be used in acquiring the plant and property of the old company and the additions thereto being made in order to enlarge that plant, and that these properties, when acquired, would pass under the mortgage by virtue of its after-acquired property clause. That this use should be made of the new bonds or their proceeds they had a right to expect. Venner's relation to the mortgagor company, and his own representations to those who took from him these bonds, were such as to make it inequitable

that he should do or permit anything which would defeat the purposes of the mortgage or conflict with his own statements that the bonds would be a first lien and the mortgage a good security. He cannot, under the circumstances of this case, be heard to set up any secret contract or agreement between himself and the mortgagor which would defeat the reasonable expectations of those who took these bonds upon his recommendation. Neither should he, by his conduct, be suffered to profit personally by any diversion of these bonds or their proceeds from the objects to which both the mortgagor and himself were bound to devote them. Let us see how he disposed of the bonds so issued to him. One hundred and twenty of them he used in exchange for a like number of the bonds of the old company. That was within the purpose of the mortgage. This leaves 80 to be accounted for. These, he says, were applied in paying himself for the Lawrence land some \$5,000. This was not permissible. That claim constituted no lien, and was but a general debt against the company, and cannot be discharged out of the fund which should have been applied so as to enlarge the security of the mortgagees. He applied about \$20,000 in the payment of interest upon the new bonds. This was a diversion. His claim for money so advanced to the new company is a claim not in the nature of a vendor's lien, and he cannot be allowed to displace the lien of the mortgage by diverting the bonds in his hands to repaying himself for such expenditures. He says he used some \$57,000 in purchasing from himself overdue coupons detached from the bonds of the old company. If the coupons were, in fact, unpaid, they were a proper outlay of the bonds of the new company, for interest was preferred over principal under the mortgage of the old company, and they would be preferential claims to be used in acquiring the mortgaged property of that company. But, under the circumstances of this case, we think it incumbent upon Venner to establish in the clearest way that these coupons were a valid and subsisting lien, enforceable under the old mortgage. These coupons matured between July 1, 1883, and July 1, 1888. More than half of them are punched, the usual way of canceling a paid coupon. These punched coupons, aggregating about \$30,000, were obtained by Venner from one S. E. Wiley, in 1889. Wiley does not remember the details of the transaction. He says his books would show, but declined to produce his books or a statement therefrom. These were transferred to Venner on a settlement between them, and that is all he will tell about it. Wiley says he furnished the money to C. H. Venner & Co. to "purchase" the maturing coupons of July 1, 1883, to July 1, 1886, and in that way became the owner. Wiley was deeply interested in maintaining the credit of bonds of the old company. He was the old company in substance. He held all, or nearly all, of its stock. He built its works, presumably for its bonds. Venner, too, was interested in maintaining the credit of the old bonds for a time at least. He had floated them, and says he furnished the means to "buy" coupons when Wiley ceased to do so. So far as these punched coupons are concerned, they must be ignored. The presumption that they were paid is so overwhelming that we shall not deal longer with them. *Farmers' Loan & Trust Co. v. Iowa Water Co.*, 78 Fed. 881; *United Water-*

works Co. v. Farmers' Loan & Trust Co., 49 U. S. App. 493, 27 C. C. A. 92, and 82 Fed. 144.

As to the remainder, the presumption of payment arises only from the circumstances under which Venner acquired them. The evidence in this record from such holders of the old bonds as have been examined leaves no doubt in our minds that the original holders of none of these coupons "cashed" over the counter of C. H. Venner & Co. understood that they were selling them, or that they intended to sell them. The persons thus testifying constitute a considerable per cent. of the original holders of these old bonds. They say they had no intent to sell, and supposed the coupons were being paid. In some instances their maturing coupons were deposited for collection with the bank of the holder; in others, they were presented for payment over the counter of C. H. Venner & Co., and paid, as they supposed. All of the original holders of such coupons have not been examined. Many are unknown. But enough have testified to establish the manner in which C. H. Venner & Co. were accustomed to "take up" these coupons. The evidence is sufficient to overturn the direct evidence of Venner that he bought them from the holders. It is not probable that such holders would sell their coupons. Under the mortgage, coupons were preferred to the principal of the bonds. Thus, the value of the common security was being all the time diminished, so far as it was intended to secure the principal of the bonds, by every sale of an interest coupon by the holder of the bond from which it was detached.

It may be true, as stated *arguendo* by Justice Strong in *Ketchum v. Duncan*, 96 U. S. 659-662, that:

"Interest coupons are instruments of a peculiar character. The title to them passes from hand to hand by mere delivery. A transfer of possession is presumptively a transfer of title. And especially is this true when the transfer is made to one who is not a debtor, to one who is under no obligation to receive them or to pay them. A holder is not warranted to believe that such a person intended to extinguish the coupons when he hands over the sum called for by them, and takes them into his possession. It is not in accordance with common experience for one man to pay the debt of another, without receiving any benefit from his act."

But it is equally true that mortgages preferring interest over principal afford peculiar facilities to those connected with failing corporations to obtain most unjust advantages over the holders of bonds, by the pretended purchase of coupons which the bondholder would not part with, to the prejudice of his bond, if he had known that the transaction by which his coupon was "cashed" was not a payment, but a sale. It is therefore a sound principle of law that the holder must intend a sale, and consent to a sale, and a mere transfer of title, when he parts with such preferred coupon, or the transaction will be treated as a cancellation and payment. The true doctrine is that announced in *Ketchum v. Duncan*, *supra*, that "it is essential to a sale that both parties should consent to it," and that "where a sale with payment is prejudicial to the holder's interest, by continuing the burden of the coupons upon the common security, and lessening its value in reference to the principal of the debt, the intent to sell should be clearly proven." To the same effect are *Farmers' Loan & Trust Co. v. Iowa*

Water Co., 78 Fed. 881, and United Waterworks Co. v. Farmers' Loan & Trust Co., 49 U. S. App. 493, 27 C. C. A. 92, and 82 Fed. 144.

The facts of the case bring it closely within *Wood v. Safe-Deposit Co.*, 128 U. S. 416, 9 Sup. Ct. 131. In this case, as in the case cited, there is much to lead one to believe that it was to the interest of both Wiley and Venner to apparently sustain the credit of the old bonds, and much to indicate that while doing so they were both secretly preparing to wreck the old company when the time should be ripe. We may say of Venner, touching the whole series of his dealings with these two companies and their mortgagees, as was said by Justice Lamar in *Wood v. Safe-Deposit Co.*, supra: "It looks very much as if he had dug a pit, and was anxiously keeping the pathway to it in good order." Into this pit he has fallen, and must there lie. It would be grossly inequitable to suffer him, upon the evidence in this record, to apply the funds in his hands to the purchase from himself of coupons obtained as he obtained these, when, by applying those funds as good faith required him to do, he could have discharged any and every obligation to himself growing out of his expenditures in the procurement of the property, which he and his company were under obligation to do. This claim is so tainted with fraud, and so inconceivable, as respects the mortgagees of the new company, that we have no hesitation in affirming the decree of the circuit court.

McRAE v. BOWERS DREDGING CO.

(Circuit Court, D. Washington, W. D. November 23, 1898.)

1. TAXATION—SITUS OF PROPERTY—DREDGES.

Dredges, having no propelling power, and not designated for use in the carrying trade, nor entitled to enrollment and registry, though employed to do work intended to aid navigation and commerce, and although they are vessels subject to maritime liens, are not instruments of interstate or foreign commerce, and may be subjected to taxation in a state other than that of the residence of their owners, when kept and employed in such state without an intention to remove them therefrom at any definite time; and such vessels are taxable in the state of Washington, under the last clause of section 1666, 1 Ballinger's Ann. Codes & St., providing that "all boats and small craft not required to be registered must be assessed in the county where the same are kept."

2. SAME—COLLECTION OF TAX AGAINST INSOLVENT CORPORATION.

A tax collector cannot distrain property of an insolvent corporation in the hands of a receiver of a court of equity which has taken charge of the insolvent estate for distribution, but the claim for taxes must be proved like other claims, and will be allowed and paid as a preferential debt.

Hearing on petition of the receiver to enjoin proceedings for the collection of taxes on property of the defendant, an insolvent corporation.

T. D. Powell, for receiver.

Walter S. Fulton, for King county.

HANFORD, District Judge. This case has been heard upon the petition filed by the receiver of the Bowers Dredging Company, pray-

ing for a perpetual injunction against the treasurer of King county, to restrain him from taking proceedings to collect taxes for the years 1896 and 1897, assessed and levied against the Bowers Dredging Company, as owner of certain personal property, consisting of the dredges or vessels called the "Anaconda" and the "Python," with their equipments, and a steam tugboat, which vessels were at the time of assessing for taxes in said years employed in executing a large contract in the harbor of the city of Seattle, in King county, which would, in the ordinary course of such work, require several years for its completion. The argument and contention on the part of the receiver are that the Bowers Dredging Company is an Illinois corporation, and therefore subject to be taxed for and on account of its personal and movable property only in the state of Illinois; that this court has decided that said dredges are vessels to which maritime and statutory liens may attach, and that they are subject to process in rem in suits within the jurisdiction of a court of admiralty; that they were designed to be navigated from place to place, wherever required for use in dredging harbors and waterways, and doing similar work in aid of commerce and navigation, and therefore have no situs other than their home port, or the place of residence of their owner.

At the outset I wish to make it clear that the ruling of this court sustaining the claims of employes and other creditors to preferential rights by reason of liens upon the dredges falls far short of placing the dredges in the class of ships or vessels intended for service as common carriers, and subject to the laws of the United States relating to inspection, registration, enrollment, and navigation of vessels employed in commerce. The decision of the court (*McRae v. Dredging Co.*, 86 Fed. 344), rests upon the proposition that canal boats, barges, dredges, and various other floating structures without masts, sails, propelling machinery, or steering apparatus, but designed to carry burdens afloat, and to be employed in aid of commerce and navigation, are vessels to which maritime and statutory liens may become attached, and that they are subject to the process of courts of admiralty for the enforcement of such liens, notwithstanding the lack of rigging and appliances essential to make an independent, seagoing vessel entitled to be registered or enrolled. The difference between registered, enrolled, and licensed vessels and any nondescript craft not entitled to be registered, enrolled, or licensed is important, for the reason that the revenue law of this state plainly recognizes a difference, classifies vessels with reference to it, and provides a different rule for the assessment and taxation of registered, enrolled, and licensed vessels from the rule applicable to vessels not entitled to be registered, enrolled, or licensed. Section 1666, 1 Ballinger's Ann. Codes & St., reads as follows:

"Sec. 1666. The personal property of express, transportation and stage companies shall be listed and assessed in the county where the same is usually kept. All vessels of every class which are by law required to be registered, licensed or enrolled, must be assessed and the tax thereon paid only in the county where the owner, or managing owner or agent thereof resides: provided, that such interest shall be taxed but once. Vessels registered, licensed or enrolled out of, and plying in whole or in part in, the waters of this state, the owners, managing owners or agents of which reside in this state,

must be assessed in this state, and in the county in which the owners, managing owners or agents reside, to the value of the respective share or shares owned by said person or persons. All boats and small craft not required to be registered must be assessed in the county where the same are kept."

As to the first class, the law is that only the interests of resident "owners, managing owners or agents" shall be taxed, and that only in the counties within which such owners, managing owners, or agents reside. The intent is manifest to exempt from taxation registered, enrolled, and licensed vessels owned wholly by nonresidents, and also the partial interests owned by nonresidents in vessels which are partly owned by citizens. But these dredges belong to another class, which, by the last clause of the section, is made subject to taxation in the county where kept. Is there any rule of law or reason which requires the court to hold that this statute is not applicable to vessels of this class, when owned by a citizen or corporation of another state? The legal fiction that a man's personal property is deemed to be where the owner is, does not control; for it is well settled that bands of cattle, stocks of merchandise, and all such movable property, may be taxed in the state in which it is kept, although the owner resides elsewhere. *Hoyt v. Commissioners*, 23 N. Y. 224, and cases cited. The rule that the property of nonresidents cannot be taxed while in transit is not applicable here; for it has been decided by the United States circuit court of appeals for the Ninth circuit, in the case of *State Trust Co. v. Chehalis Co.*, 24 C. C. A. 584, 79 Fed. 282, that, to be exempt under that rule, property must be actually in transit, or "there must be at least an intention and fixed purpose to remove it within a reasonable time." A purpose to remove it at any time in the future when it may suit the owner's convenience is not sufficient.

Only one other ground of exemption remains to be considered. The supreme court has held in *Hayes v. Steamship Co.*, 17 How. 596, and in *Morgan v. Parham*, 16 Wall. 471, that vessels engaged in interstate commerce are taxable only at their home ports, and that other states, at whose ports such vessels call to discharge or receive freight or passengers, either regularly or casually, have no dominion over them to tax them. Upon this last proposition and these cases the argument in behalf of the receiver mainly rests. In both cases stress was laid upon the facts that the vessels were registered and were ocean-going ships, employed in interstate commerce. The pith of the decisions is found in the last sentence of the opinion by Mr. Justice Hunt in *Morgan v. Parham*, in which he said that the taxation of vessels so employed "is an interference with the commerce of the country not permitted to the states." It is my opinion that these dredges, although employed to do work intended to aid navigation and commerce, are not instruments of interstate or foreign commerce; and for that reason the two cases referred to are not in point, and do not sustain the argument that the statute of this state which subjects this class of property to taxation in the county where kept is an attempted exercise of power by the state which the federal constitution forbids. This case bears a much closer analogy to *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194-255, 17 Sup. Ct. 305, in

which the supreme court affirmed the constitutionality of the law of Ohio providing for the taxation of telegraph, telephone, and express companies doing business in that state. In the opinion of the court, by Chief Justice Fuller, a line of supreme court decisions is cited, all holding that the property of railroad, telegraph, and sleeping-car companies in the several states through which their lines or business extend might be valued as a unit for the purposes of taxation, and that a proportion of the whole, fairly and properly ascertained, might be taxed by each particular state in which the corporation has property or does business. If this decision does not overrule *Hayes v. Steamship Co.* and *Morgan v. Parham*, it at least draws a plain distinction between vessels afloat and having no other situs than their home ports, and property which must be stationary or be kept at one place when in use, and it is therefore of controlling authority in this case.

The steam tugboat which was assessed as property of the Bowers Dredging Company was not owned by the company, and the tax lien upon it has been foreclosed by a sale of the boat under admiralty process. Therefore the receiver cannot lawfully pay that tax out of any assets in his hands. The tax collector cannot distrain or seize any property of the insolvent corporation while it is in the receiver's custody, and so the injunction prayed for will be granted; but the order to be entered will direct the receiver to pay the amount of taxes levied upon the dredges as a preferential debt, in conformity to the rule that, when a court of equity takes the entire estate of an insolvent into its custody, it will marshal the assets, determine the priorities, and distribute the fund to the creditors or others whose rights have been established.

CHICAGO, M. & ST. P. RY. CO. v. TOMPKINS et al.

(Circuit Court, D. South Dakota. July 6, 1898.)

1. CARRIERS—STATE REGULATION OF RATES—CONSTITUTIONALITY.

A state having lawful authority, either by legislative enactment or through a commission, to establish rates and fares for the carriage of freight and passengers between points within its limits, rates and fares so established are prima facie lawful and valid, and, to authorize a court to interfere with their enforcement, it must be shown beyond a reasonable doubt that such enforcement will result in depriving individuals or corporations affected thereby of their property without due process of law or of the equal protection of the laws.

2. SAME—INDEBTEDNESS OF RAILROADS.

The power of a state to establish rates and fares for the carriage of freight and passengers within its jurisdiction cannot be destroyed by the sum which a railroad company may be pleased to charge to the operating expenses of its road in the state or the amount of indebtedness it may have created on such road.

3. SAME—BASIS FOR COMPUTATION OF LOCAL EARNINGS.

Under the rule announced by the supreme court in *Smyth v. Ames*, 18 Sup. Ct. 434, 169 U. S. 546, that, in fixing its schedule of rates and fares, a state cannot charge against a railroad company its interstate earnings, the only method of arriving at a true and just valuation upon which to figure local earnings is to ascertain what per cent. the local earnings constitute of the gross earnings of the road in the state, and to take the

same per cent. of the total value of its property in the state as the capital which is invested to produce the local earnings.

4. SAME—CONSTITUTIONALITY OF STATE TARIFF RATES.

Where a computation based upon the evidence shows that the gross local earnings of a railroad for the four preceding years, under a schedule of rates and fares proposed to be put into effect by the state, would have been from 12 to 18 per cent. upon the value of the property used to produce such earnings, varying in the different years, a court cannot say, beyond a reasonable doubt, that such schedule is unconstitutional, as depriving the company of its property without due process of law.

This is a suit in equity by the Chicago, Milwaukee & St. Paul Railway Company against William H. Tompkins, W. T. La Follette, and Alexander Kirkpatrick, constituting the board of railroad commissioners of the state of South Dakota.

George R. Peck and A. B. Kittredge, for complainant.

T. H. Null and W. O. Temple, for defendants.

CARLAND, District Judge. The above-entitled action has been submitted upon pleadings and proofs. The object of the action is to perpetually restrain the defendants, as railroad commissioners of the state of South Dakota, from putting in force a certain schedule of rates and fares made by them on the 26th day of August, 1897, prescribing the rates and fares to be charged by common carriers within the state of South Dakota for the carriage of passengers and freight. At the time of the filing of the bill, a temporary injunction was issued, and the defendants have, in the meantime, been restrained from putting into effect the schedule referred to. The testimony that has been reported by the examiner is quite voluminous, consisting of about 1,000 pages of printed matter, but the testimony which must really decide this case is not of great length.

In the first place, it is proper to state, briefly, the principles of law which have been established by the supreme court of the United States for the guidance of this court in deciding actions of this character.

In *Smyth v. Ames*, 169 U. S. 526, 18 Sup. Ct. 426, the supreme court declares the following principles of law to be settled:

"(1) A railroad corporation is a person, within the meaning of the fourteenth amendment declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"(2) A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad, that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the fourteenth amendment of the constitution of the United States.

"(3) While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

In approaching the consideration of this case, guided by the above principles of law, the court fully appreciates the difficulty and em-

barrassment which surround the decision of a question where it is sought to have the court declare the legislative action of a state unconstitutional, and where the decision of the facts involved requires the exercise of knowledge with which courts of justice are presumed to have but little acquaintance.

It is now settled law that a state, by legislative enactment, may directly itself, or through a board of commissioners, establish rates and fares for the carriage of freight and passengers between points within its limits. This being an exercise of lawful legislative authority on the part of the state, all acts in pursuance thereof, either by the state directly or by its commissioners, must be presumed, until the contrary clearly appears, to be within the legislative authority and valid. It necessarily follows, also, that when a board of railroad commissioners, authorized by a law of the state to fix rates and fares for the carriage of freight and passengers within its limits, fixes those rates, that those rates and fares are *prima facie* reasonable and just. It is also provided, by the act of the legislature under which the defendants are claiming to act, that the rates and fares established by them, or any schedule of such rates and fares, shall be *prima facie* evidence that the rates are reasonable and just, in any controversy where they shall come in question. It thus appears that the burden of proof is upon the complainant to establish, beyond a reasonable doubt, that the rates and fares which the defendants are seeking to put in force will, if lawfully made and promulgated, result in the taking of complainant's property without due process of law, or will deprive the complainant of the equal protection of the law. In other words, the complainant must show the court that the acts of the defendant commissioners are unconstitutional, as being in conflict with the constitution of the United States.

While it is true that the legislature of a state may not, under its power to regulate rates and fares for the carriage of freight and passengers within its limits, deprive the complainant, or any other person or corporation, of its property without due process of law, or deprive it, or any other person, of the equal protection of the laws, it is also equally true that this court has no power or authority, given by statute or common law, to fix rates and fares for the carriage of freight and passengers upon the complainant's lines, or to revise in any manner rates established by the defendants as railroad commissioners. The court only has the power and jurisdiction to declare acts of the legislature, or of the board of railroad commissioners performed in pursuance thereof, unconstitutional, if clearly in conflict with the constitution of the United States. No court will declare an act of a legislature unconstitutional without it is shown to be so beyond a reasonable doubt.

This, then, gives the status of the complainant in this action before this court. This court must be satisfied, beyond a reasonable doubt, that the schedule of rates proposed to be promulgated and put in force by the railroad commissioners, the defendants in this action, will, if so put in force, deprive the complainant of its property without due process of law, or deprive it of the equal protection of the law.

We now come to consider the evidence which has been reported in this action upon which it is asked that this court issue a permanent injunction against the defendants as railroad commissioners, enjoining them from putting into force the rates and fares complained of.

The first contention of the complainant is that the record shows that during the fiscal years ending June 30, 1894, 1895, 1896, and 1897, the complainant, under the rates and fares which are now in force upon its system for the carriage of freight and passengers, was not able to earn sufficient money to pay its operating expenses in the state of South Dakota, its taxes in the state of South Dakota, and the interest due upon the bonded debt upon that portion of its lines located within the state of South Dakota, and that there was a deficiency between the earnings in the state of South Dakota, from all sources, during the said years, and the operating expenses, taxes, and interest of said years, of \$2,729,858.81,—being \$507,080.52 for the fiscal year ending June 30, 1894; \$841,500.89 for the year ending June 30, 1895; \$773,343.41 for the year ending June 30, 1896; and \$607,933.99 for the fiscal year ending June 30, 1897.

If it is the law that the power of the state to regulate fares and rates for the carriage of passengers and freight within its jurisdiction does not arise or become operative until some railroad corporation has paid all the debts it may have seen fit to contract, or paid all the expenses which it is pleased to charge to the account of operating expenses, then the power in the state to regulate rates and fares is worthless, and of no avail to prevent the exaction of exorbitant charges from the public for the services rendered. This cannot be the law. No court has yet held it to be the law, and it is not believed any court will ever be found which will hold it to be the law. Such a proposition violates the rules of common sense, and is maintained with a seeming forgetfulness that the power of the state to regulate the rates and fares for the carriage of freight and passengers cannot be contracted away and rendered nugatory by contracts between third parties, to which the state has never consented to become a party.

The case of *Smyth v. Ames*, supra, did not decide as to just how much a railroad corporation, or any other person or corporation, could earn before the state would have a right to reduce the rates and fares for the carriage of passengers and freight within its limits. It did say that just how such compensation may be ascertained, and what the necessary elements are in such an inquiry, would always be an embarrassing question. In the case of *Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198, the supreme court said:

"Each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. * * * The utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature,

when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just, both to it and to the public."

In regard to whether the contention of the complainant that it has a right to earn enough to pay all of its fixed charges, operating expenses, and taxes before the right of the state to interfere becomes operative, the supreme court in the case of *Smyth v. Ames*, 169 U. S. 543, 18 Sup. Ct. 432, says:

"In the discussion of this question, the plaintiffs contended that a railroad company is entitled to exact such charges for transportation as will enable it, at all times, not only to pay operating expenses, but also to meet the interest regularly accruing upon all its outstanding obligations, and justify a dividend upon all its stock; and that to prohibit it from maintaining rates or charges for transportation adequate to all those ends will deprive it of its property without due process of law, and deny to it the equal protection of the laws. This contention was the subject of elaborate discussion; and, as it bears upon each case in its important aspects, it should not be passed without examination. In our opinion, the broad proposition advanced by counsel involves some misconceptions of the relations between the public and a railroad corporation. It is unsound, in that it practically excludes from consideration the fair value of the property used, omits altogether any consideration of the right of the public to be exempt from unreasonable exactions, and makes the interests of the corporation maintaining a public highway the sole test in determining whether the rates established by or for it are such as may be rightfully prescribed as between it and the public. A railroad is a public highway, and none the less so because constructed and maintained through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for public purposes. It performs a function of the state. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the constitutional guaranties for the protection of its property. *Olcott v. Supervisors*, 16 Wall. 673, 694; *Sinking Fund Cases*, 99 U. S. 700, 719; *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 657, 10 Sup. Ct. 965. It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders. If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged. What was said in *Road Co. v. Sandford*, 164 U. S. 578, 596, 597, 17 Sup. Ct. 198, 205, is pertinent to the question under consideration. It was there observed: 'It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent. upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. * * * The public cannot properly be subjected to

unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them, which the constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as, in view of the nature and value of the services rendered by the company, are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable.' A corporation maintaining a public highway, although it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges, and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business, may, by legislation, protect the people against unreasonable charges for the services rendered by it. It cannot be assumed that any railroad corporation, accepting franchises, rights, and privileges at the hands of the public, ever supposed that it acquired, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit, without regard to the rights of the public. But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs have rights that may not be invaded by legislative enactment, in disregard of the fundamental guaranties for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it."

This being the latest announcement by the supreme court upon this question, it must be taken as the law, and nowhere can it be gathered from its language that the complainant has a right to pay all of its indebtedness before the state can regulate its charges for the carriage of passengers and freight. The court, therefore, dismisses the proposition that the defendant railroad commissioners cannot reduce the present schedule of rates and charges now in force upon the complainant's lines merely because it is shown that the earnings therefrom do not pay the indebtedness and operating expenses of the complainant, as the complainant company itself never seems to have been able to adopt a schedule that would accomplish that object, nor, in face of the record, can the complainant claim that it ever adopted a schedule of rates and fares upon its lines within the state of South Dakota which was based upon the value of the services rendered. Mr. Bird, general traffic manager of the complainant, a witness for the complainant, when upon the stand, testified as follows:

"I testified this morning that I had been in the service somewhat over thirty years, and had been engaged in making rates during that time, and I never have yet had an opportunity of making a tariff on a basis of what the service was worth. I have never had the opportunity to determine the rate by the value of the services. The rates are made what they must be."

The supreme court in the case of *Smyth v. Ames*, 169 U. S. 546, 18 Sup. Ct. 434, declared as follows:

"We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And, in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as

compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

Here is the rule, and the only question for the court now to ascertain is, what is the fair present value of the railroad property used by the complainant, in the state of South Dakota, upon which it is entitled to earn what the services rendered are reasonably worth?

There is no direct testimony in the record as to the present value of the complainant's railroad property in the state of South Dakota. There is testimony as to the original cost of rolling stock bought years ago; there is testimony as to the original cost of rails bought years ago; and there is the estimated cost of a good many articles of property, by the officers of the company, but in no case does any witness swear to the present actual value of any piece of property owned and operated in the state of South Dakota by the complainant company. The only way that the court can get at the reasonably fair value of the complainant's property, used and operated as aforesaid, is by estimating, I might say guessing, just as the witnesses of the complainant have estimated and guessed, as to its value. The court was inclined at one time to be of the opinion that it was unable from the testimony to ascertain what the fair present value of the complainant's property in South Dakota was, in view of the conflicting statements of witnesses called upon that question, and the great disparity between the value of the property fixed by the company for the purpose of this suit and the value of the same property fixed for the purpose of taxation. But the court has carefully examined the testimony introduced in regard to the value of the property in question, and after considering all the circumstances and incidents, under the rules of the supreme court which should govern the court in fixing the value, the court is unable to find that the present fair value of the complainant's property in the state of South Dakota used for railroad purposes is to exceed \$10,000,000. It is true that the record shows that the property is bonded and mortgaged for an amount largely in excess of this sum, but the amount of a mortgage upon property is no evidence of its value, and, therefore, is not worthy of consideration. Neither is the fact that a railroad company bought engines at a certain price 10 or 15 years ago any binding evidence that the engines now are worth a dollar, in the absence of any testimony as to where they have been used, how they have been kept, and what their present condition is. The record fairly shows that it is not the new property of the complainant company that is used in South Dakota.

This being fixed by the court as the fair and reasonable value of the complainant's railroad property, what would be a reasonable sum for it to charge for the services which it renders to the public? The

supreme court in the case cited says that the state, in fixing its schedule of rates and fares for the transportation of passengers and freight, cannot consider and charge against the company its interstate earnings. While the complainant company strenuously insists upon the enforcement of this rule, it as vigorously insists that the per cent. which the state may allow the complainant to earn must be figured upon the total value of its property in the state, because all the business in the state of South Dakota transacted by the complainant is local business, with the exception of an occasional train of cattle from Chamberlain or an occasional train of wheat from Eureka, and that, therefore, all the cost of operation should be charged to the local earnings. In other words, that although for the four fiscal years ending June 30, 1894, 1895, 1896, and 1897, respectively, the interstate earnings in the state of South Dakota were \$4,026,682.21, still the state cannot charge against the road these interstate earnings, but may charge against the road its local earnings; the percentage of local earnings to be figured on the total value of the property in the state, thus leaving the interstate earnings relieved from any burden. Is this fair, is it just, for the company to say to the state of South Dakota that "while it is true that, in the four years mentioned, we have earned, on interstate business in the state of South Dakota, the sum of \$4,026,682.21, still you cannot charge that against us, but you can only charge your local earnings, figured on the total valuation of our property (\$10,000,000), and that local earnings are such a small percentage of the total value of the railroad in South Dakota that it does not give the company what the services are reasonably worth"?

The argument for the company is that the court cannot separate the value of the property with reference to the earnings, because it requires all the property and all the machinery and all the labor to earn the local earnings. Admitting this to be so, it still remains that, during the years which the court has mentioned, the company earned, in interstate business, by the use of this property and under the franchises granted to it by the state of South Dakota, the sum of \$4,026,682.21. So that it is entirely unjust to make the local earnings bear the whole burden by ascertaining the per cent. of the total valuation that the local earnings would produce. No court as yet has promulgated any rule as to how this court shall arrive at a true and just valuation upon which to figure local earnings. In the absence of any such rule, this court believes that it is fair and just to first ascertain what per cent. of the total gross earnings in any one year the total local earnings are for that year, and, having ascertained that per cent., to take the same per cent. of the total value of the property as a fair value upon which to fix local earnings. Following out this rule, let us take the four fiscal years immediately prior to the institution of this suit, and ascertain what per cent. the local earnings for these years would have earned upon a valuation thus determined, and what reduction of that percentage will be made by the schedule sought to be promulgated by the defendants, and which it is stated reduces the present tariff of complainant, speaking in round numbers, 15 per cent. on local passenger business, and 17 per cent. on local freight business. The total earnings from all sources of the complainant company on its

lines in the state of South Dakota, for the fiscal year ending June 30, 1894, were \$1,840,651.79. The total local earnings for freight and passenger services during the same period were \$407,606.35. In round numbers, this would make the local earnings 22 per cent. of the gross earnings from all sources for the year 1894. Twenty-two per cent. of \$10,000,000, the value of complainant's property in the state of South Dakota, would be \$2,200,000. The local earnings for said year, stated above as \$407,606.35, using round numbers, would be 18.5 per cent. on said last-mentioned sum. The total earnings from all sources of the complainant company on its lines in the state of South Dakota, for the fiscal year ending June 30, 1895, were \$1,236,680.78. The total local earnings for freight and passenger services during the same period were \$330,642.85. In round numbers, this would make the local earnings 26 per cent. of the gross earnings from all sources for the year 1895. Twenty-six per cent. of \$10,000,000, the value of the complainant's property in the state of South Dakota, would be \$2,600,000. The local earnings for said year, stated above as \$330,642.85, using round numbers, would be 12.7 per cent. on said last-mentioned sum. The total earnings from all sources for the fiscal year ending June 30, 1896, were \$1,557,100.60. The total local earnings for freight and passenger services during the same year were \$328,105.95. In round numbers, this would make the local earnings 21 per cent. of the gross earnings from all sources for the year 1896. Twenty-one per cent. of \$10,000,000, the value of complainant's property in the state of South Dakota, would be \$2,100,000. The local earnings for said year, \$328,105.95, using round numbers, would be 15.6 per cent. on said last-mentioned sum. The total earnings from all sources, for the fiscal year ending June 30, 1897, were \$1,605,210.66. The total local earnings from freight and passenger services during the same period were \$311,005.42. In round numbers, this would make the local earnings 19 per cent. of the gross earnings from all sources for the year 1897. Nineteen per cent. of \$10,000,000, value of complainant's property in the state of South Dakota, would be \$1,900,000. The total earnings for 1897, \$311,005.42, using round numbers, would be 16.3 per cent. on the last-mentioned sum.

It will thus be seen that the local earnings of the complainant's lines on the same proportion of the total value of the road as the local earnings bear to the gross earnings from all sources, in South Dakota, were: For the year 1894, 18.5 per cent.; for the year 1895, 12.7 per cent.; for the year 1896, 15.6 per cent.; for the year 1897, 16.3 per cent.

Now, let us ascertain the per cent. which the local earnings of the road for the four years mentioned would produce on the proportionate valuation above stated, after being reduced by the proposed schedule of the railroad commissioners. For the year 1894 the total local freight earnings were \$137,459.88, which, being reduced 17 per cent., would equal \$114,091.70. For the same year the total local passenger earnings were \$270,146.47, which, reduced 15 per cent., would equal \$229,624.50. These reduced local freight and passenger earnings equal \$343,716.20. This reduction on the local business would reduce the total earnings from all sources from \$1,840,651.79 to \$1,

776,761.64, of which amount the reduced local earnings for the year 1894 would be, in round numbers, 19 per cent. Nineteen per cent. of \$10,000,000 would be \$1,900,000, and the local earnings, as reduced, would be 18 per cent. of that amount. For the year 1895 the total local freight earnings were \$121,442, which, being reduced 17 per cent., would equal \$100,796.86. For the same year the total local passenger earnings were \$209,200.85, which, being reduced 15 per cent., would equal \$177,820.72. Total reduced local freight and passenger earnings, \$278,617.58. This reduction on the local business would reduce the total earnings from all sources for that year from \$1,236,680.78 to \$1,184,655.51, of which amount the reduced local earnings for the year 1895 would be, in round numbers, 23 per cent. Twenty-three per cent. of \$10,000,000 would be \$2,300,000, and the local earnings for that year, as reduced, would be 12.1 per cent. of that amount. For the year 1896 the total local freight earnings were \$110,432.45, which, being reduced 17 per cent., would equal \$91,660.93. For the same year the total local passenger earnings were \$217,673.50, which, reduced 15 per cent., would equal \$185,022.47. Total reduced local freight and passenger earnings, \$276,683.40. This reduction on the local earnings would reduce the total earnings from all sources for that year from \$1,557,100.60 to \$1,505,678.05, of which amount the reduced local earnings for the same year would be, in round numbers, 18 per cent., and 18 per cent. of \$10,000,000 would be \$1,800,000, and the local earnings for that year, as reduced, would be 15.3 per cent. of that amount. For the year 1897 the total local freight earnings were \$102,239.23, which, being reduced 17 per cent., would equal \$84,900.06. For the same year the total local passenger earnings were \$208,716.19, which, being reduced 15 per cent., would equal \$177,408.76. Total reduced freight and passenger earnings, \$23,308.82. This reduction on the local earnings would reduce the total earnings from all sources for that year from \$1,605,210.66 to \$1,556,514.06, of which amount the reduced local earnings for the same year would be, in round numbers, 16 per cent. Sixteen per cent. of \$10,000,000 would be \$1,600,000, and the local earnings for that year, as reduced, would be 16.2 per cent. of that amount.

It will be thus seen that, if the commissioners' schedule of rates and fares had been in effect during the four years that we have considered, there would have been an earning on the value of the property apportioned to local earnings of 18 per cent. for the year ending June 30, 1894; 12.1 per cent. for the year ending June 30, 1895; 15.3 per cent. for the year ending June 30, 1896; 16.2 per cent. for the year ending June 30, 1897. It certainly would be impossible for this court to find beyond a reasonable doubt that these per cents. allowed to be earned by the railroad company for local earnings would be depriving it of its property without due process of law, or depriving it of the equal protection of the laws. The court has not overlooked operating expenses, or the difference between the cost of earning local and interstate earnings; but the court is of the opinion that, when the local earnings under complainant's schedule show for the years 1894, 1895, 1896, and 1897 a percentage on capital invested of 18.5 per cent., 12.7 per cent., 15.6 per cent., and 16.3 per cent., respectively, and for

the same years under defendants' proposed schedule a percentage of 18 per cent., 12.1 per cent., 15.3 per cent., and 16.2 per cent., then the small reduction, taken in connection with the high percentages earned under it, makes it unnecessary to discuss what the exact amount of the profits would be. This being the view of the court, it necessarily results that the bill must be dismissed, and the temporary restraining order granted in this action dissolved.

DOUGLASS v. KAVANAUGH et al. GIBBS et al. v. DOUGLASS et al.
KAVANAUGH et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. November 9, 1898.)

Nos. 589-591.

1. BUILDING AND LOAN ASSOCIATIONS—USURY—STATUTE OF TENNESSEE.

Under the Tennessee statute governing building and loan associations, which permits associations formed thereunder to sell their loans, in open meetings, to the stockholder bidding the highest premium, which premium is not to be considered as interest, within the general usury law, it is only a premium bid in open competition which is lawful; and where an association made its loans privately, without such competition, exacting a fixed premium, whether determined by its by-laws or in disregard of their provisions, such premium renders its loans usurious.

2. SAME—INSOLVENCY—BASIS OF SETTLEMENT WITH BORROWING STOCKHOLDERS.

On the insolvency of an association, the proper basis of settlement with borrowing stockholders is that which maintains the distinction between them as stockholders and as borrowers, by applying sums paid as dues on their stock; thus placing them on the same footing as nonborrowing members, and crediting payments of premium and interest on the loans. Where illegal premiums were exacted, which render the loans usurious, the borrowers should be charged with the sum actually received, and credited with payments made of premiums and interest as of the date when paid.

3. SAME—RECOVERY OF USURY PAID.

A stockholder, who was also a borrower, in a building and loan association which exacted illegal and usurious premiums from its borrowers, who settled up his loan while the association was solvent by paying the amount due thereon after receiving credit, not only for his payments, but also for the accrued profit on his stock, made up largely of such illegal premiums, or one who suffered foreclosure and also received credit for such profits, cannot, after the association has become insolvent, recover back the usurious premiums paid by him, as against the remaining stockholders, and at the same time retain the illegal profits he has received; but a stockholder who has repaid his loan, but still retains his stock, and who received no credit for such illegal gains, may recover the usury paid, under a statute permitting such recovery.

4. SAME—ILLEGAL ISSUE OF STOCK—RIGHTS OF HOLDERS.

The issue of more shares of stock to one person than is permitted by the charter of the association is not in itself fraudulent, and the holders of such excess stock at any time before the contract has been executed by full payment are entitled to rescind and recover the amounts paid thereon; and where before that time the association becomes insolvent, and its affairs are liquidated, and the share of its assets accruing to such stock does not exceed the amount paid thereon, other stockholders cannot complain that the court, to save expense, and for convenience, permits the stock to share in such assets.

Cross Appeals from the Circuit Court of the United States for the Eastern District of Tennessee.

Harry H. Ingersoll, for W. F. Gibbs and John P. Kavanaugh.
R. H. Sansom, for A. J. Douglass.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge. These three appeals have been heard together, and are appeals from the final decree in a stockholders' suit filed for the purpose of winding up an insolvent Tennessee building and loan association. A number of errors have been assigned upon the final decree: (1) By the receiver, who has appealed from so much of the decree as held the loans made by the association to its stockholders to have been usurious, and from so much thereof as settles the basis upon which the indebtedness of such borrowers was adjusted. (2) By certain usury claimants, who have intervened to recover usury paid by them upon loans which were either voluntarily or involuntarily adjusted and closed while the association was a solvent and going concern. (3) By certain individual stockholders, who excepted to the participation of certain alleged illegal or overissue shares in the distribution of assets, and who have appealed because their exceptions were overruled, and the alleged unlawful shares suffered to participate with legal shares in the distribution of assets. We shall dispose of these questions in the order stated.

1. The receiver's exception was properly overruled. The loans made by the association were not in accord with the terms of the charter, and were clearly usurious. The general law of the state provided that no interest in excess of 6 per cent. should be lawful. This association was incorporated under another general law of the state, providing for the organization of building and loan associations. That general law permitted such companies to lend their money to stockholders at a rate not exceeding the lawful rate of 6 per cent. per annum, but also provided that all such loans shall be made by the directors, at stated times and in open meeting, to the stockholder who should bid the highest premium. This charter law contemplated that this premium should be a bonus paid, "not as interest, but as a means of determining which one of the shareholders shall receive the loan whenever there are a number of stockholders who may simultaneously desire to effect a loan." Laws 1875, c. 142, § 14. The effect of this charter provision was to modify the interest laws of the state, and to legalize the taking of such a "bonus" or "premium," when paid, as a result of the free and open competition of bidders, at a sale of the money of such an association, in the mode and manner provided by the law of organization. This was the construction and meaning put upon the statute authorizing the incorporation of such companies in the leading case of *Patterson v. Association*, 14 Lea, 689. In the subsequent case of *Post v. Association*, 97 Tenn. 408, 37 S. W. 216, this case was followed, and the necessity of strictly following the charter method of making loans was emphasized in a remarkably strong

and able opinion by Mr. Justice Wilkes. In that case it appeared that the loans of the association were made, not at open and free sales, and that the premiums were not the highest bonus bid at such a sale, but were settled by a by-law which provided that no premium should be received in excess of 30 per cent. or less than 29 $\frac{1}{2}$ per cent. That case must be taken as deciding that whenever the premium received for a loan was not the result of a free and competitive sale, but was fixed by mere agreement of the parties or by-law of the association, the loan would be usurious, and the premium an illegal exaction. "A premium, in order to be lawful," said Justice Wilkes, "must be one that is bid for the right of precedence in taking a loan at a competitive sale; and when there is no such sale, and no bid, there can be no lawful premium." The special master to whom the subject was referred reported that the Savings Building & Loan Association had not followed the charter method of making loans, but had adopted a uniform or level premium of 50 per cent. The evidence did not show that this result was reached by a by-law, as in *Post v. Association*, supra. The means for securing the same result were quite as efficient, however. Moneys were never sold in open meeting and upon free competition. The practice was to apply to the secretary for a loan, who would inform them that the custom or practice was to authorize him to make a bid of 50 per cent. This grew into the common law of the association, and the proof was that the invariable bid was 50 per cent., and that for years no loan was made at any other than this enormous premium. The loan was awarded, not to the highest bidder at a sale, but to the bidder whose security was most satisfactory. This method was not in accordance with the charter power. There was no sale, no competitive bidding. The premium was not paid for precedence in obtaining a loan, but as a part of the price demanded by the lender from the borrower. The practice was in open and flagrant violation of the organic law of the corporation, and premiums thus obtained were an unlawful exaction. The association is now insolvent. Nonborrowing stockholders cannot be repaid in full, and the assets must be ratably divided. What shall be the basis of settlement with borrowing stockholders? The rule adopted by the master and affirmed by the circuit court was that approved in *Rogers v. Hargo*, 92 Tenn. 35, 20 S. W. 430; *Post v. Association*, 97 Tenn. 408, 37 S. W. 216; *Strohen v. Association*, 115 Pa. St. 273, 8 Atl. 843; and by *End. Bldg. Ass'n*s (2d Ed.) §§ 514, 515. That rule maintains the distinction between the stockholder as such, and the stockholder as a borrower. It charges him, as a borrower, with the money he actually received, with interest from its receipt, and credits him with all payments of premium and interest as of the date when paid. He is not allowed credit for the payments of dues upon his stock. With reference to his stock payments, he is treated as if a nonborrower, and the fund remaining after all prior liabilities are paid is distributed pro rata among stockholders upon the basis of the amounts paid by them, respectively as dues, whether borrowers or not. We did not consider the question as to what proportion of a premium paid in advance should be

returned when the company ceases to do business before maturity of the stock of the borrower. That question could only arise if the premium was one lawfully exacted. The premiums taken by this association were not lawfully taken, and must therefore be credited against the loan.

2. Were the intervening usury claimants entitled to recover usurious premiums paid by them? These appellants may be divided into two or more subclasses. We shall first dispose of those who, while the corporation was solvent and going, voluntarily paid off their loans by paying the balance due after applying as a credit thereon the then full withdrawal value of the shares upon which the loan had been made. The withdrawal value of stock thus canceled was ascertained according to the by-law which permitted a stockholder who was a borrower to receive the value of his stock as a credit on his loan, upon paying the balance due. That withdrawal value was made up of two items,—dues paid on the particular shares, and the distributive share of the profits of the association due to such stock. The profits included the unlawful gains taken from the whole class of borrowers. These settlements were made when the capital had not been impaired, and thus such settlements involved the return to the shareholder of all dues paid on his shares, as well as a proportion of the supposed gains of the association. It now turns out that the gains were for the most part unlawful, and the company is insolvent. Those who remained to the end will receive no gains, and but a pro rata of the stock dues paid in. These petitioners propose to hold on to all they received in their settlement, and recover in addition the premiums paid on their loans. They do not offer to open up the settlement made, but stand on section 1955 of Code Tenn. 1858, which provides that one who has paid usury may, in an action, recover it from him who received it. This statutory right of action is by no means conclusive as to the remedy of these interveners. This is a court of equity. This association is insolvent. If petitioners stood upon the footing of judgment creditors for usury paid, it would still be the duty of this court to marshal the assets, and determine the equitable right of such a creditor to share in the assets. The question is whether such claimants shall be suffered to inquire into the amount of usury paid by them, without opening up the settlement heretofore made, so that they shall stand, as withdrawing stockholders, upon an equal footing with those who remained. Equity is equality. These claimants have settled and adjusted their relations, and received the benefit of unlawful gains through usurious premiums. They cannot hold with one hand to the results of that settlement, and reach out the other for a further dividend at the expense of shareholders who will suffer a greater loss pro rata than petitioners. They must account for what they received. This they do not propose to do. They were properly repelled. This was in accord with *Loan Ass'n v. Woods*, 42 S. W. 872,—a case decided by the supreme court of Tennessee pending this suit, and not yet officially reported. The appellants of this class, who made default and suffered foreclosure, and now sue to recover usury, are in substantially the same situation as

those just disposed of. They received a credit upon their loans of the then full withdrawal value of the shares upon which their loans were made. This credit, having been received when the company was solvent, gave them back all their dues and a proportion of the profits, including usurious premiums. They submitted to this mode of adjusting their relation as borrowing shareholders, and should not be permitted to repudiate that settlement, except by offering to do equity, and returning that which they received, thus placing themselves upon an equality with those in a less fortunate situation. In *McCauley v. Association*, 97 Tenn. 421, 37 S. W. 212, the borrower did not assent to or accept the credit placed against his loan. He demanded that the premium exacted should be also credited, and sought to enjoin foreclosure. The class of borrowers with which we are dealing here accepted the credit, which included a share in the profits, and did not demand a further credit for the illegally exacted premium. They submitted to a foreclosure for the balance due, ascertained through an adjustment made according to the by-laws of the corporation. The corporation is now insolvent, and the rights of stockholders among themselves make it inequitable that these borrowers shall reopen a settlement thus made, which involved both the relation of borrower and stockholder, without doing equity. Adkins and wife are in a different situation. They borrowed and paid off their loan without receiving any credit for the withdrawal of the shares upon which they borrowed. They are still stockholders in respect to those shares. Not having participated in any unlawful gains, nor made any settlement involving such gains, they are free to present their claim as creditors, to the extent of the premium actually paid by them. The decree will be reversed as to them.

3. The last question is as to the attitude of certain shares, presented for participation in the assets, supposed to have been illegally issued. The charter provides that "no one person shall hold more than 50 shares of stock." Laws 1875, c. 142, § 14. It now appears that several persons were permitted to subscribe for more than 50 shares. The right of such excess shares to participate in the distribution of the assets was challenged by an exception taken to the master's report by a few individual stockholders, who claimed the right to protect the common fund by excepting to any claim they should deem improper. Neither the corporation nor the receiver made objection to these excess shares. This was doubtless due to a ruling made by the court which convinced them that it was not to the general interest of the corporation, its creditors or shareholders, to make technical objections to the report in respect to these shares. That ruling came about in this way: The holders of these excess shares applied to the court for leave to so amend their several intervening petitions as to aver their ignorance of the inhibition in the charter in respect to the holding of shares, and to pray that the contract of subscription be canceled, and their installments paid on such stock be returned to them. This leave was denied; the court ruling that, without formal pleadings, he would permit them to recover their payments on this stock, if it should be found

that they could not share otherwise in the assets. When the exceptions to the master's report came on to be heard, they were overruled, as having no real merit. If these holders of excess shares were entitled to recover their several payments to the corporation, the appealing stockholders are not injured by the decree appealed from. The recovery allowed will not diminish the common fund beyond that recoverable out of that fund upon the footing of creditors. There was no limitation in the charter as to the number of shares that might be issued. The limitation was upon the number which might be held by one person. This limitation would make it illegal for the corporation to receive a subscription for more than 50 shares by the same person. This excessive subscription was not *malum in se*. It was, however, *malum prohibitum*. This distinction is important only in respect to the right of such subscriber to rescind the unlawful contract, and sue to recover that which he had paid in part performance thereof. This was an unexecuted contract. The contract was to pay for the shares in monthly installments, called "dues," until paid for. The payment was but partially completed when the company ceased to do business. While the contract was unexecuted there remained a *locus poenitentiae*. The delictum was incomplete, and either party might rescind the contract. The doctrine as stated in 2 Com. Cont. 361, and adopted by the supreme court as a sound statement of the law in *Spring Co. v. Knowlton*, 103 U. S. 49-58, is this:

"Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed, and both parties are in *pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books, that, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void, and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover."

This doctrine was applied in the case of *Spring Co. v. Knowlton*, *supra*; and a subscriber who had paid one installment upon an issue of illegal increase stock was permitted to recover the money paid, though before rescission his subscription had been forfeited for default in payment of subsequent installments. In that case the court, through Mr. Justice Woods, said:

"It is to be observed that the making of the illegal contract was *malum prohibitum*, not *malum in se*. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud."

The doctrine in this case finds further illustration and application in *Thomas v. City of Richmond*, 12 Wall. 349; *Hitchcock v. Galveston*, 96 U. S. 341; *Louisiana v. Wood*, 102 U. S. 294; *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24-57 *et seq.*, 11 Sup. Ct. 478; *Ohio Life Ins. & Trust Co. v. Merchants' Ins. & Trust Co.*, 11 Humph. 1; and *Andrews Bros. Co. v. Youngstown Coke Co.*, 30 C. C. A. 293, 86 Fed. 585, 596.

Technically, these holders of excess shares could not obtain a standing as shareholders; and it would have been better practice to have suffered them to file their amended petitions, rescind the contract, and assert their claims as creditors. To save delay and costs, this was not done. The appellants who interposed the exceptions which raised the question are not in an attitude to demand a reversal by reason of the technical objection that as stockholders they were not entitled to a standing. The decree does not affect any substantial right of appellants. To reverse, and allow amended petitions and a recovery of installments paid on these excess shares, would cost the fund more than the pro rata these shares will receive under the decree. There is therefore no merit in this assignment of error, especially as the great body of beneficiaries are content. The decree will in all respects be affirmed, save as to Adkins and wife. As to them it is reversed. The receiver will pay the costs of appeal in 589. The costs in the other cases will be paid by the appellants, except Adkins and wife.

WESTERN UNION TEL. CO. v. ANN ARBOR R. CO.

(Circuit Court of Appeals, Sixth Circuit. November 9, 1898.)

No. 524.

1. MORTGAGES—RIGHTS GRANTED IN THE PROPERTY BY MORTGAGOR.

Under the general law governing mortgages in this country, a mortgagor is entitled to possession until condition broken, and during such time may lease and deal with the property in all respects as owner, subject, however, to the rights of the mortgagee, upon whose entry into possession all rights granted by the mortgagor cease and determine; the contracts by which such rights are granted, whether of tenancy or of an easement, being no longer of force as against the mortgagee, nor binding upon the grantees.

2. SAME—EFFECT OF FORECLOSURE—STATE STATUTE.

The statute of Michigan (2 How. Ann. St. § 7847) providing that no action of ejectment shall be maintained by a mortgagee or his assigns or representatives for the recovery of the mortgaged premises until the title thereto shall have become absolute on a foreclosure of the mortgage merely takes away the remedy of the mortgagee by entry or ejectment, and does not in any way affect his rights against those claiming an interest in the premises under the mortgagor, which are divested by the taking of possession after foreclosure the same as by entry at common law; and it is not necessary, to that end, that a tenant or the holder of an easement should have been made a party to the foreclosure.

3. TELEGRAPHS—RIGHT TO OCCUPY RAILROAD RIGHT OF WAY—EFFECT OF ACT OF CONGRESS.

The act of July 24, 1866 (Rev. St. §§ 5263, 5268, 5269), authorizing telegraph companies complying with its terms to construct and maintain their lines along and over all post roads of the United States; and Rev. St. § 3964, making all railroads post roads,—do not give a telegraph company the right to occupy the right of way of a railroad with its line without its consent, or a contract with a prior owner which is binding upon it.

4. SAME—RIGHT OF WAY—POWERS OF COURT OF EQUITY.

A court of equity has no power, on the ground of public necessity, to effect an equitable condemnation of an easement of way for a telegraph line over the right of way of a railroad, on which it was built and operated

under a contract with a prior owner of the road, which has been terminated by the sale of the road on foreclosure of a mortgage antedating such contract.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

This was a bill in equity by the Western Union Telegraph Company—First, to restrain the defendant, the Ann Arbor Railroad Company, from interfering with the telegraph wires and poles of the complainant, running from Thompsonville to Frankfort, on the line of the defendant's railroad; second, to compel the defendant to allow the complainant to reconnect the wires to the complainant's main line on the Chicago & Western Michigan Railroad, and to use the wires for its telegraph business as they were used before they were disconnected by the defendant; and, third, to require the defendant to carry out the contract under which said poles and wires were erected, made by the Western Union Telegraph Company with the Frankfort & Southeastern Railroad Company, a former owner of this part of defendant's line of railway. The complainant relies, in its bill, not only upon the contract made with the Frankfort & Southeastern Railroad Company, as binding upon the defendant, but also upon the provisions of the act of congress passed July 24, 1866, the provisions of which the complainant company accepted, and which, the bill avers, confer a right upon the complainant to maintain its telegraph line on the railroad as a post road of the United States.

The defendant answered, setting forth the circumstances under which it acquired title; and, after replication, the case was heard on the following agreed statement of facts: That on March 1, 1889, the said the Frankfort & Southeastern Railroad Company executed a mortgage upon all its property and assets, of every kind and description, whether then owned or thereafter to be acquired by said company, to Henry Day and Albert C. Hall, as trustees, which mortgage was thereupon, to wit, on the 11th day of May, 1889, duly recorded in the counties through which the road passed; that the road was sold by the mortgagor to the Toledo, Ann Arbor & North Michigan Railway Company; that subsequent mortgages were issued by the grantee company, and there was a default upon all the mortgages, including the one first above mentioned, and foreclosure proceedings were begun upon all of them; that the railroad here in question was sold at foreclosure sale under the mortgage of March 1, 1889, to the trustees under said mortgage, from whom, by mesne conveyance, the title was transferred to the defendant, the Ann Arbor Railroad Company; that the complainant was not a party to these foreclosure suits; that the contract between the complainant and the Frankfort & Southeastern Railroad Company was entered into on the 25th day of September, 1890, more than a year after the execution of the mortgage, to Day and Hall, trustees; that Day and Hall, trustees, knew of the contract and complainant's claim of right under it before foreclosure; that the Ann Arbor Railroad Company was delivered possession of the railroad by the order of the court in the foreclosure proceedings; and that, after notice to the complainant, it declined to recognize any obligation upon it arising from complainant's contract with the Frankfort & Southeastern Railroad Company, and disconnected the wires, as averred in the bill. By complainant's contract with the Frankfort & Southeastern Railroad Company, the latter agreed to furnish and distribute for the telegraph company, free of cost, along the line of the railroad, cedar poles, 30 to a mile, to furnish all the labor to dig the holes in which to set the poles, to place the wires and insulators thereon, under the direction of a foreman of the telegraph company, to maintain the poles and wires at its own expense in good order and repair, and to reconstruct them when required by the telegraph company. The telegraph company agreed to furnish the wires and insulators for the entire line, and the necessary batteries. The railroad company agreed to furnish, free of charge, in its station houses, suitable space for batteries. The telegraph company agreed to set apart the first wire erected along said railroad for the joint use of the parties to the contract for the transmission of railroad and commercial telegraph business. By the fourth section it was agreed that either party might establish telegraph stations at such places as it might deem necessary; that the telegraph com-

pany should furnish the instruments; that the railroad company should furnish the operators, and all messages pertaining to the railroad business should be transmitted free. The railroad company agreed to transport, free of charge, all officers and employes and all material for the use of the telegraph company, and, if the telegraph company elected to establish an independent office at a station of the railroad company, the railroad company agreed to furnish office room, light, and fuel free of charge in such station. The eighth section was as follows: "Eighth. The railroad company, so far as it legally may, hereby grants and agrees to assure to the telegraph company the exclusive right of way on, along, and under the line, lands, and bridges of the railroad company, and any extensions and branches thereof, for the construction, maintenance, operation, and use of lines of poles and wires and underground or other lines for commercial or public uses or business, with the right to put up or construct, or cause to be put up or constructed, from time to time, such additional lines of poles and wires and underground or other lines as the telegraph company may deem expedient; and the railroad company agrees to clear, and keep clear, said right of way of all trees, undergrowth, and other obstructions to the construction and maintenance of the lines and wires provided for herein; and the railroad company will not transport men or material for the construction, maintenance, or operation of a line of poles and wire or wires or underground or other lines in competition with the lines of the telegraph company, party hereto, except at and for the railroad company's regular local rates, nor will it furnish for any competing lines any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations: Provided always that, in protecting and defending the exclusive grants conveyed by this contract, the telegraph company may use and proceed in the name of the railroad company, but shall indemnify, and save harmless the railroad company from any and all damages, costs, charges, and legal expenses incurred therein or thereby." By the eleventh section it was "mutually understood and agreed that the telegraph line, poles, wires, and fixtures covered by the contract shall be the property of the telegraph company, and shall form part of its general telegraph system, and shall be controlled and regulated by the telegraph company, which shall fix and determine all tariffs for the transmission of messages and all connections with other lines and interests." By the twelfth section the provisions of the agreement were extended to all railroads then owned, leased, controlled, or operated by the Frankfort & Southeastern Company, and to all railroads thereafter owned, leased, controlled, or operated by that company, or by any company or corporation in which that company might own a majority of the stock, or whose action it might be able to control by ownership of stock or otherwise. The provisions of the contract, it was stipulated, should be and continue in force for and during the term of 25 years from the 25th day of September, 1890, and should continue after the close of the term, until the expiration of one year after written notice should have been given after the close of the term, by either party to the other, of an intention to terminate the same.

The circuit court held that the contract was in all respects, except in so far as it purported to create an easement in the real estate in the nature of a right of way, a contract personal to the Frankfort & Southeastern Railroad Company; that the burden of that contract did not pass to and become a charge upon the defendant in this case upon its purchase under the foreclosure of the mortgage or mortgages upon the Frankfort & Southeastern Railroad Company's lands and property, unless by some conduct the Ann Arbor Railroad could be held to have adopted the contract as its own, and that no such conduct was proven in the case; that, in respect of the right of way,—a supposed easement affecting the real estate, and which, it was claimed, created rights outlasting the continuance of the personal covenants in the contract,—the right to the easement ceased with the continuance of the personal covenants, and had no foundation upon which it could last independently of the personal covenants; and, further, that, this being so, the parties, in the making of the original contract, knowing, as they must be presumed to know, that this would be the natural consequence, must be held to have intended

that the easement should not continue for the term stated, unless the principal things contemplated by the contract should continue to endure, and require, in order to give them effect, that the easement should also continue; that no foreclosure was necessary; that the easement had ceased; that the telegraph company had the right to remove the personal property, which, by the terms of the contract, were to inure to and belong to it; and that it had, under the circumstances attending the entry of the present railroad company upon the lands and property of the Frankfort & Southeastern Railroad Company, an implied license to enter upon the property, and remove the same. The bill of the complainant was accordingly dismissed.

Rush Taggart and C. A. Kent, for appellant.

Alex L. Smith, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge (after stating the facts). Had the mortgage of the Frankfort & Southeastern Railroad Company the character and incidents of a mortgage at common law, it cannot be doubted that, by the entry upon the premises of the assignee of the mortgage, all rights of the telegraph company under its contract would have ceased, and its attempt to continue the enjoyment of the easement said to have been created thereby would have been nothing but a trespass. In England, at the common law, title and right of possession passed to the mortgagee at once upon the execution of the mortgage, and, if the mortgagor remained in possession, he was not more than a tenant at will. He could not bind the mortgagee by any contract or grant with reference to the land mortgaged, and any one entering by his license, lease, or grant was, as to the mortgagee, only a trespasser, whom the latter might enter upon and oust, or against whom he might bring ejectment, without notice to quit.

In *Keech v. Hall*, 1 Doug. 21, a mortgagor in possession had, after the mortgage, made a lease in writing for seven years. The mortgagee brought ejectment against the lessee of the mortgagor, without giving him notice to quit, and had judgment. Lord Mansfield said:

"When the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will, in the strictest sense; and therefore no notice is ever given him to quit, and he is not entitled to reap the crop, as other tenants at will are, because all is liable to the debt, on payment of which the mortgagor's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage."

The law, even of those states of this country where no change has been made by statute, is more liberal to the mortgagor. Until condition broken, though the title passes to the mortgagee, he holds it merely as security, and not until after a breach has he the right to enter upon the mortgagor, or to maintain ejectment against him. The mortgagor has a right to lease, sell, and in every respect to deal with the mortgaged premises as owner, so long as he is permitted to remain in possession, and so long as it is understood that every person taking under him takes subject to all the rights of the mortgagee, unimpaired and unaffected. 4 Kent, Comm. 157. It is, however, well settled that no contract of lease, which the mortgagor may make with respect to the land, either inures to the benefit of the mortgagee, or is

binding on him. There is in such case no privity of either estate or contract between the mortgagee and the lessee of the mortgagor to bind either, and the entry of the mortgagee into possession under the mortgage merely avoids the lease, and releases the lessee from any obligation. *Moran v. Railway Co.*, 32 Fed. 878, 886; *Teal v. Walker*, 111 U. S. 242, 248, 4 Sup. Ct. 420. Under this general doctrine, it cannot be doubted that, in the case at bar, the entry of the mortgagee or his grantee into possession would have avoided all the telegraph company's rights, and that its alleged easement granted for 25 years would be at an end. The grantee of an easement for 25 years certainly stands upon no higher ground than a lessee for such a term. Indeed, his position is not so good in this case. A lessee has possession of all the land mortgaged, and may, perhaps, be said to have acquired pro tanto the equity of redemption and an estate in the land. The holder of this easement, which can only be enjoyed in connection with certain personal covenants certainly not binding on the mortgagee, has no possession of the land mortgaged in any proper sense, but merely a right in alieno solo against the mortgagor. If, therefore, an entry of the mortgagee upon the lessee would avoid his interest in the land, a fortiori would it end the interest of one who holds from the mortgagor nothing but a naked right in the nature of an easement in gross and incapable of enjoyment, except upon terms in no wise binding upon the mortgagee.

The question which remains for our consideration is whether, in Michigan, where this railroad lies, the character of a mortgage differs so widely from that of mortgages in other states that the result of the law of mortgages in other states would not obtain there. It is provided by statute in Michigan (2 How. Ann. St. § 7847) that no action of ejectment shall be maintained by a mortgagee or his assigns or representatives for the recovery of the mortgaged premises until the title thereto shall have become absolute upon a foreclosure of the mortgage. The effect of this statute is merely to take away the remedy of the mortgagee by entry or ejectment, but it does not in any way affect his rights against those claiming an interest in the premises under the mortgagor. The rule that the mortgagor cannot bind the mortgagee by lease or other contract is not changed thereby. When the mortgagee acquires possession of the mortgaged land by foreclosure sale, the effect of his possession upon those claiming under the mortgagor is just as complete to avoid their rights and interest as was entry or ejectment at common law. Nor does it prevent this result that the holder of the easement may not have been made a party to the foreclosure suit. The easement was granted subject to being divested by the mortgagee's acquiring possession of the mortgaged premises. That event has happened, and the divesting follows. Of course, if the telegraph company had been made a party to the foreclosure, the decree would have settled the rights of the purchaser as against the telegraph company as *res judicata*, and would have conclusively established that the company had no interest in the land after sale. As the company was not a party to the decree, however, the divestiture of its right must be shown by proof of the execution of the mortgage prior to the contract for the easement, and the entry into possession by the mortgagee or his assignee under

foreclosure and sale. We have found no Michigan authority in point upon this question, but, in other states having statutes like the one from Michigan above quoted, the conclusion we have reached is well sustained by adjudicated cases.

In Iowa, by statute, the mortgagor retains the legal title and the right of possession until foreclosure and sale. Code Iowa 1873, p. 357; Jones, Mortg. § 29. In *Downard v. Groff*, 40 Iowa, 597, A. sued G. on a covenant of general warranty. G. was the assignee of a mortgage, and at foreclosure bought in the property, and sold with warranty to A. The breach assigned was that D., the mortgagor, after the execution of the mortgage, had leased the land to one L., and that L., who had not been made a party to the foreclosure proceeding, had refused to yield possession, and had taken the crops growing at the time of the sale. It was held that no breach was shown, because the purchaser had the right to evict L., and to take the emblements. The court said:

"It may be conceded that since Leroy, the tenant, was in possession under a lease from the mortgagor, and was not made a party to the foreclosure suit, that he is not bound or affected by the judgment therein. But this fact does not alter the rights of the mortgagee, or of the purchaser under the foreclosure sale, as against such tenant. It only affects the remedy, and defeats the use of the judgment as evidence. By the lease from Dorstal, the mortgagor, to Leroy, the latter acquired no greater rights in the premises than the mortgagor had. The tenant stands exactly in the situation of the mortgagor. As between the mortgagor and mortgagee, the latter, by the foreclosure and sale, became entitled to the possession of the premises, and to all the crops then growing thereon. This right of the purchaser was not and could not be defeated by reason of the lease, or by the fact that the possession was in, or that the crops were grown by, the lessee. The right to the possession, and the right to the growing crops, passed to the purchaser. If the tenant had been made a party to the foreclosure suit, the possession and the crops could have been delivered to him by process under that judgment; but, since he was not made a party thereto, he cannot obtain that remedy except by some other action. The purchaser's rights, however, are just the same as they would have been if the tenant had been made a party. It follows, therefore, that Groff, by his purchase and sheriff's deed, became the absolute owner of the premises, including the crops growing thereon; and by his conveyance he invested the plaintiff herein with that ownership, and she might, by proper action, have enforced her rights as such owner against the tenant. Her failure to do so cannot give her any cause of action against the defendant, her grantor."

In California the title and right of possession of the mortgagor continues until foreclosure and sale. *McMillan v. Richards*, 9 Cal. 365; 1 Jones, Mortg. § 20. In *McDermott v. Burke*, 16 Cal. 580, the action was ejectment by the purchaser at a mortgage foreclosure sale against the lessees under a term of five years, granted by the mortgagor after the execution of the mortgage. The lessees had not been made parties to the foreclosure suit. Chief Justice Field, who had delivered the opinion in *McMillan v. Richards*, supra, also delivered the judgment of the court in this case. He said:

"We are of opinion that the legal rights of the lessee were extinguished by the proceedings in the foreclosure suit and sale following the decree thereon. A mortgagor cannot make a lease which will bind his mortgagee, where the lessee at the time had notice of the mortgage, either actual or constructive. The interest of the lessee in such case is dependent for its duration, except as limited by the terms of the lease, upon the enforcement of the mort-

gage. So long as the mortgage remains unenforced, the lease is valid against the mortgagor, and in this state against the mortgagee; but with its enforcement the leasehold interest is determined. There is no privity of contract or of estate between the purchaser upon the decree of sale and the tenant. The purchaser may therefore treat the tenant as an occupant without right, and maintain ejectment for the premises. He cannot, for the want of such privity, count upon the lease, and sue for the rent or the value of the use and occupation. The relation between the purchaser and tenant is that of owner and trespasser until some agreement, express or implied, is made between them with reference to the occupation. Until then, both are equally free from any contract obligations to each other. The tenant is not bound to attorn to the purchaser, nor is the latter bound to accept the attornment, if offered. The purchaser may prefer to have the possession, and the tenant may also prefer to surrender it. * * * The error of the plaintiff arises from the misapprehension of the rule as to the parties necessary to the foreclosure of a mortgage. The rule only requires, as parties, those who are beneficially interested in the claim secured or in the estate mortgaged. The tenant is not thus interested in the claim. He is not entitled to its proceeds when collected, or to any portion of the proceeds. Nor is he thus interested in the estate mortgaged; that is, in the title which is pledged as security. He has not succeeded to such estate, or to any portion of such estate. He does not stand, therefore, in the position of a purchaser. The estate remains in his lessor. He has only a contingent right to enjoy the premises. The right of the lessor to the possession ends with the sale of the premises, or, rather, with the deed by which the sale is consummated. The right of the tenant to such possession depends upon that of the lessor, and goes with it."

In New York no action of ejectment can be sustained by a mortgagee for the recovery of the mortgaged premises, and the mortgagor has a right to sell or lease subject to the rights of the mortgagee. In *Simers v. Saltus*, 3 Denio, 214, the suit was by the mortgagor on a covenant of a lease for rent. The defense was eviction. The facts were that the lessor, being the owner in fee of the land, had given a mortgage upon the same before he made the lease upon which suit was brought, and that the mortgagee had foreclosed the property, and brought it to a sale; that the purchaser had said to the tenant that he might continue to occupy the land, and the contention was that, by such consent, the lessee continued bound under the lease. The court held, however, that, by the foreclosure and sale, the lease of the tenant had been extinguished. The court said:

"If the mortgagor, subsequent to the mortgage, lease the premises, the mortgagee cannot distrain or sue for the rent, because there is no privity of contract or of estate between the mortgagee and tenant, unless the tenant attorn to the mortgagee after the mortgage has become forfeited, which he may do. * * * After foreclosure and sale of the mortgaged premises, in possession of a lessee of a mortgagor, under a lease subsequent to the mortgage, the lessee is considered a wrongdoer, and is not entitled to notice to quit; and against him an action of trespass will lie by the purchaser for taking and carrying away the crops. *Lane v. King*, 8 Wend. 584."

The same principle is laid down in Indiana, a state which has the same statutory provisions in respect to the remedies of the mortgagee as Michigan. *Jones v. Thomas*, 8 Blackf. 428. It is true that in *Lockhart v. Ward*, 45 Tex. 227, it was held by a majority of the court (the chief justice dissenting) that ejectment would not lie in favor of a mortgagee purchasing at the foreclosure sale against the lessee of a mortgagor, who had not been made a party to the foreclosure proceedings; but the weight of authority is to the contrary, as we have seen. A tenant for years under a mortgagor, when evicted by the

mortgagee before or after foreclosure, may redeem the mortgage. *Averill v. Taylor*, 8 N. Y. 44; *Bacon v. Bowdoin*, 22 Pick. 401. And it is possible that the grantee of such an easement as this one claimed at the bar might be accorded the same privilege; but, however that may be, in the absence of redemption the right to enjoy the easement ended with the entry of the purchaser at foreclosure sale. The complainant company had no right to object, therefore, when the purchaser refused to permit it to enjoy the easement longer, and disconnected the wires; and the prayer for an injunction against such acts was rightly denied. The defendant railroad company conceded all that was claimed by the complainant in respect to the personal property and fixtures under clause 11 of the contract, and no controversy arises thereon.

It is contended, further, that the telegraph company may continue to maintain a telegraph line over defendant's railroad without its consent, by virtue of the act of congress passed July 24, 1866 (Rev. St. §§ 5263, 5268, 5269). By this act it is provided that any telegraph company organized under the laws of any state shall have the right to construct, maintain, and operate lines of telegraph over and along any of the post roads of the United States, after filing a written acceptance of the obligations and restrictions of the act. By section 3964, Rev. St., passed in 1872, all railroads or parts of railroads in the United States are established as post roads. In *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1, 11, it was held that the purpose of this legislation was to secure the convenient transmission of intelligence by telegraph in the United States from state to state without state interference, and that it was a legitimate regulation of interstate commerce by congress. Speaking of the act, the court said:

"It gives no foreign corporation the right to enter upon private property, without the consent of the owner, and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

Again, the court said:

"No question arises as to the authority of congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. * * * If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized."

The authority establishes, if authority were needed, that the telegraph company cannot occupy the line of defendant's railroad without the consent of defendant, or the consent of some predecessor in title, which is binding on the defendant. This, we have seen, is wanting. The suggestion, however, seems to be, if we understand it, that, because of the public necessities, the court ought to use its injunction process and shape its decree so as to effect an equitable condemnation of the easement of way. The court has no such power.

The decree of the circuit court is affirmed, with costs.

JAMISON v. INDEPENDENT SCHOOL DIST. OF ROCK RAPIDS, LYON COUNTY, IOWA.

(Circuit Court, N. D. Iowa, W. D. December 1, 1898.)

1. MUNICIPAL BONDS—VALIDITY—LIMIT OF INDEBTEDNESS.

Bonds issued by a school district which was indebted beyond the constitutional limit may be enforced where they were issued and used for the purpose of funding a valid outstanding judgment against the district.

2. SAME—ILLEGALITY IN INCEPTION—BONA FIDE PURCHASER—BURDEN OF PROOF.

A school district issued negotiable bonds, which it exchanged for a bond previously issued, when it was indebted in excess of the constitutional limit, and which was also fraudulently obtained from the district by the original holder, without consideration. It did not appear that the person with whom the exchange was made was a holder for value of the old bond. *Held*, that a transferee of the new bonds could not recover thereon without proof that he was a bona fide purchaser for value and before maturity.

In the above case, the parties plaintiff and defendant, by a written stipulation, duly filed, waived a jury trial, and agreed that the case should be tried by the court upon the facts and the law; and, from the evidence submitted, the court finds the facts to be as follows:

(1) When this action was brought, the plaintiff, W. H. Jamison, was a citizen of the state of California, and the defendant, the independent school district of Rock Rapids, was a municipal corporation, created under the laws of the state of Iowa, being one of the school districts of Lyon county, Iowa.

(2) The county of Lyon is one of the corporate counties of the state of Iowa, and, prior to the year 1872, was attached to Woodbury county, Iowa, for judicial and revenue purposes. It was organized as a separate county, about January 1, 1872.

(3) That in 1871 the following described territory, in said Lyon county, Iowa, was organized into the township of Rock, the same constituting the school district township of Rock, to wit, all of the territory of said county comprised in township 100, ranges 43, 44, 45, and 46, and all of the north half of township 99, ranges 43, 44, 45, and 46; and that such district township of Rock existed as such territory without change of boundaries until the fall of 1872, when the said territory was organized into the independent school district of Rock Rapids, the independent school district of Riverside, and the district township of Grant.

(4) That the valuation of the taxable property within said district township of Rock, as shown by the state and county tax lists, was as follows: For the year 1871, \$150,571; for the year 1872, \$149,511.12.

(5) That the first tax list of the independent school district of Rock Rapids was in the year 1873, and that the valuation of the taxable property within said independent school district of Rock Rapids, as shown by the state and county tax lists from 1873 to 1881, inclusive, was as follows: For the year 1873, \$90,188.19; for the year 1874, \$88,544.35; for the year 1875, \$87,517.13; for the year 1876, \$86,604.66; for the year 1877, \$77,886.59; for the year 1878, \$52,441.82; for the year 1879, \$84,320.51; for the year 1880, \$94,049; for the year 1881, \$99,032. For the year 1879 the exemption allowed under the tree-culture acts of the state of Iowa amounted to \$5,329.80; for the year 1880, to \$10,334; and for the year 1881, to \$12,872. In the totals given for the valuation of the taxable property of the district for these years, the amount of these deductions has not been subtracted.

(6) This action is based upon four negotiable bonds, with interest coupons,—two numbered 7 and 8, being called "judgment bonds," dated June 14, 1881, for \$500 each, payable in 10 years from date, the coupons from Nos. 11 to 20, inclusive, on both bonds, being unpaid; and two bonds, also numbered 7 and 8, for \$500 each, dated June 14, 1881, and payable in 10 years from date, with coupons from 11 to 20, inclusive, on each bond, being unpaid,—all of the

said bonds and coupons being duly signed by the president and secretary of the defendant district, and the same being the property of the plaintiff.

(7) On the 14th day of June, 1881, there appeared of record the following unsatisfied judgments against the defendant district:

Name.	Date.	Amount.	Costs.
O. A. Cheney.....	Feb. 18, 1875	\$ 90 00	\$ 7 25
T. E. Converse.....	Sept. 25, 1874	62 50	7 85
Eureka Mfg. Co.....	Sept. 21, 1876	51 85	
Joy & Wright.....	Sept. 21, 1876	312 04	
J. K. P. Thompson.....	May 14, 1878	243 68	4 45
Joy & Wright.....	Feb. 18, 1879	529 94	
Gammon & Deering.....	Sept. 30, 1879	280 00	4 85
J. W. Taylor.....	Sept. 30, 1879	192 66	4 75
J. K. P. Thompson.....	Dec. 9, 1879	245 75	3 75
Aultman, Miller & Co.....	May 19, 1880	206 00	4 65
J. A. Perry.....	May 19, 1880	497 41	4 85
		\$2,711 23	\$44 40

(8) On the 11th day of October, 1872, two judgments were rendered in the circuit court of Lyon county, Iowa, against the district township of Rock,—one in favor of George W. Felt & Co., for the sum of \$946.87 and costs, \$2.50; and one in favor of John A. Schmidt, for the sum of \$4,525.70 and costs, of \$2.50.

Under date of February 11, 1880, an entry of satisfaction is made on the record of the Schmidt judgment, as follows:

"Received of the clerk of the circuit court of Lyon county, Iowa, for the independent district of Rock Rapids, on this judgment, Feb. 11, 1880, payment in full for one-third of said judgment, the amount received for said one-third being two thousand one hundred and seventy-five dollars.

"John A. Schmidt,

"By O. C. Tredway, His Atty."

On the record of the judgment in favor of George W. Felt & Co., the following entries appear: "Apl. 29, 1876, due \$58.90; May 29, 1876, order issued for \$59.40, delivered to S. C. Hyde. Bonded one bond \$500.00; 2 bonds, 200 each. See record circuit court; see page 10 (margin)."

(9) On November 7, 1872, the voters of the defendant district voted in favor of the issuance of \$8,000 of bonds by the district for the purpose of erecting a school house, and, in pursuance of this vote, the board of directors adopted a resolution authorizing the issuance of the bonds; and the same were issued and placed in the hands of the treasurer of the district, D. C. Whitehead, with whom a contract for building a schoolhouse was entered into, but it was not fulfilled by Whitehead; and on January 6, 1875, a resolution was adopted by the board of directors recting the issuance of the bonds, the appropriation thereof by Whitehead, and a proposition made by him to build a graded school building for the district, in consideration of the receipt by him of the bonds and the proceeds thereof, the board accepting the proposition thus made.

(10) The evidence shows that prior to June 14, 1881, the date of the bonds sued on, the defendant district had become indebted on warrants and bonds in a sum largely in excess of 5 per cent. upon the value of the taxable property of the district, as the same existed in the years 1872 to 1881, both inclusive; and the district was so indebted when the bonds sued on were issued and disposed of, but the accounts and books of the defendant district have been so badly kept that it is practically impossible to state just when or for what consideration the warrants and bonds were in fact issued.

(11) The two bonds, of \$500 each, numbered 7 and 8, declared upon in the first count of the petition, were issued for the purpose of funding a judgment then outstanding against the defendant district, and were in fact used for that purpose.

(12) The two bonds, of \$500 each, numbered 7 and 8, and declared upon in the second count of the petition, were issued and used for the purpose of

funding bond No. 5 of the issue of November 7, 1872, for \$1,000, which on June 14, 1881, was owned by one D. M. Hathaway, a resident of Illinois.

A. Van Wagenen and Joy & Joy, for plaintiff.

J. M. Parsons and E. C. Roach, for defendant.

SHIRAS, District Judge. Under the facts of this case, there seems to be no escape from the conclusion that the bonds issued under the circumstances set forth in the ninth finding of facts were, when issued, null and void. The amount of this issue, being \$8,000, exceeded 5 per cent. upon the total valuation of the taxable property in the district township of Rock, out of which the defendant district was carved, in the fall of 1872, and therefore the amount of the bonds, when issued, clearly exceeded 5 per cent. upon the valuation of the taxable property in the defendant district. Furthermore, it appears that the bonds, when issued, were delivered to D. C. Whitehead, who was the treasurer of the district, who disposed of the same, and appropriated the proceeds to his own use, and the district received but little benefit or consideration therefrom. The evidence further shows that on the 14th day of June, 1881, the date of the bonds sued on, the defendant district was indebted in a sum in excess of the constitutional limit, and therefore could not lawfully create a further indebtedness. Consequently, the bonds in suit must be held to be invalid and void, unless it is shown that they represent a pre-existing enforceable indebtedness. So far as the two bonds, called "judgment bonds," are concerned, the evidence, though not entirely satisfactory, justifies the conclusion that they were in fact issued to bond an outstanding judgment against the district; and, having been issued and used for that purpose, the bonds were valid and enforceable in the hands of the original holder, and are equally valid in the hands of the present plaintiff. With respect to the two bonds called "refunding bonds," the evidence shows that they were issued to refund bond No. 5 of the issue of November, 1872, which bond was invalid under the constitutional restriction, and was without consideration and fraudulent in the hands of the original holder. The evidence shows that on June 14, 1881, this \$1,000 bond was owned by D. M. Hathaway, who exchanged the same for the two bonds in suit. The evidence fails to show that Hathaway paid value for the \$1,000 bond, or that the plaintiff paid value for the refunding bonds issued in lieu thereof. It is not averred in the petition that the plaintiff paid value therefor, nor is there any evidence from which it can be found, as a matter of fact, that the plaintiff became the owner of the bonds before maturity or for value.

The case, so far as it rests upon these bonds, comes within the rule laid down by the supreme court in *Smith v. Sac Co.*, 11 Wall. 139, that, if there be fraud or illegality in the inception of negotiable paper, proof thereof in a suit thereon casts upon the plaintiff the burden of showing that he is a holder for value; and, in the absence of such proof, the holder will be deemed to be merely a transferee, against whom the same defenses may be made that would be available against the original holder of the paper. I therefore hold that there can be no recovery on the so-called "funding bonds," but that the plaintiff is entitled to recover the sum due on the judgment bonds,

and the coupons thereto belonging, being the sum of \$1,902.30. In this computation, the coupons becoming due before April 7, 1888, are not included, as the same are barred by the statute of limitations. Judgment will therefore be entered in favor of plaintiff for the sum of \$1,902.30, each party to pay their own costs.

HADLEY v. PROVIDENT SAVINGS LIFE ASSUR. SOC. OF NEW YORK.

(Circuit Court, D. Massachusetts. November 30, 1898.)

No. 675.

1. LIFE INSURANCE — REPRESENTATIONS NOT MATERIAL TO RISK—INTENT TO DECEIVE.

An applicant for life insurance, in answer to a question, stated that he had never directly or indirectly been engaged in the sale of wines or liquors. He had during 10 years, ending 5 years before the application was made, been engaged in business as a druggist, in connection with which he had sold considerable quantities of liquors. In an action on the policy, it was *held* that if the statement was made willfully, with intent to deceive, was relied on, and did deceive, it would avoid the policy, though immaterial to the risk; but if it was made incidentally, without reckless intent, and without having in mind the distinction between the traffic in liquors as a traffic by itself and as one incidental to the druggist's business, where it was not material to the risk, it would not constitute a defense.

2. SAME.

Northwestern Life Ins. Co. v. Muskegon Bank, 122 U. S. 501, 7 Sup. Ct. 1221, and Insurance Co. v. Davey, 123 U. S. 739, 8 Sup. Ct. 331, applied.

On Motion for New Trial.

Alfred Hemenway and Arthur J. Selfridge, for plaintiff.

Robert M. Morse and T. H. Desmond, for defendant.

PUTNAM, Circuit Judge. This case having been tried to a jury with a verdict for the plaintiff, the defendant has moved that the verdict be set aside, and a new trial granted. The action is based on a contract of life insurance payable to the plaintiff, issued by the defendant on the application of the person whose life was insured. The court limited the defense to questions of alleged misrepresentations, excluding all defenses based on alleged warranties. Some of the alleged misrepresentations were claimed to have related to matters which might ordinarily be regarded as immaterial to the risk, and others to such as were material. The law as to each of these classes of representations was fully explained to the jury, as will appear with reference to representations which might be regarded by the jury as relating to immaterial matters, by the extracts from the charge which will be given. The instructions relating more especially to matters which might be regarded as ordinarily material to the risk, we need not give. As to the former class of representations, the only facts which need be stated are as follows:

In the application, the applicant was asked, "Are you now, or have you ever been, directly or indirectly, engaged in the sale of wines,

spirits, or malt liquors?" to which he answered, "No." The court ruled that if this answer was substantially untrue, and if the applicant, when he made the answer, knew it to be untrue, and made the answer intending to deceive the company, fearing that, if he answered truthfully, the company would not issue the policy, or would charge him a higher rate of premium, and if the company relied on the answer in connection with other matters, not on the answer alone, but on it in connection with other matters, the verdict must be for the defendant, even though the question, in the opinion of the jury, was whimsical.

The court also said:

"On this matter I make an element of the intention to deceive. I do not mean to say that you are required to find an intention to deceive as an absolute, independent fact from any special circumstances in the case." "Ordinarily, when a party puts a question which concerns his transactions with another, and the other knowingly and willfully answers it falsely, and, in consequence of that false answer, a bargain is completed, the intention to deceive is inferred by the law and the jury. When a man tells a falsehood to accomplish a certain purpose, and the purpose is accomplished, it is a rule of common sense, with which the common law does not take issue, that the intention to deceive accompanies the telling of the falsehood." "The answer may have been made carelessly. The answer may have been made, as suggested by the learned counsel for the plaintiff, not having in mind the distinction between the traffic in liquors, as a traffic by itself, and as one incidental to the druggist's business. If made incidentally, if made without reckless intent, if made through mere oversight, where it is not material to the risk, it would not suffice to establish a defense. Neither would it suffice to establish a defense unless it was relied on by the underwriters, nor unless it was one of the inducements which led the underwriters to issue the policy."

In passing on the motion for a new trial, as the defendant properly says, the instructions to the jury must be accepted as stating the law correctly. Of course, there are exceptional cases where the court is justified in granting a new trial on the ground of improper instructions; but this is not one of them. In the case at bar the ends of justice will be promoted by assuming the law to have been correctly given to the jury. It will be perceived by these instructions that, with reference to representations which might be regarded as relating to immaterial matters, the jury were expressly instructed that there must be an actual intent to deceive on the part of the person making them, and that the making of them merely incidentally, without a reckless intent or through mere oversight, would not suffice to establish a defense. The policy issued in January, 1897. At that time the applicant was about 47 years old, and he had been in active business 26 years. During 10 of those years, from 1882 to 1892, his principal business had been that of a druggist. In 1892 he entirely abandoned that business, and became very largely interested in manufactures, controlling large manufacturing corporations, and doing in that direction a very extensive business. In connection with his drug business, he had sold a very considerable amount of intoxicating liquors. There was evidence which ought to have satisfied the jury that this was not strictly limited to such liquors as were needed in the applicant's drug business, and that he carried a considerable stock, and made large sales for family uses, if not in some cases for consump-

tion on the premises. But he discontinued the whole of it when he discontinued the drug business; so that, for five years prior to his application for the policy in suit, he had been entirely disconnected from it. Strictly speaking, this representation was not in accordance with the facts; and yet it is clear, on this statement, that there was some ground on which the jury might find that he regarded this business so incidental as not to be called for by the interrogatory put to him, and better ground for its finding that it did not occur to him that the interrogatory was intended to reach a business of this character from which he had abstained for so many years.

But the matter takes on a clearer phase. It is said by the defendant that the applicant had been engaged in the sale of intoxicating liquors during 10 years, and that during that period he had sold thereof, at least, \$100,000 worth. In this respect the statement of the defendant substantially agrees with what, on the whole, must be held to have been quite clearly proved in the case. But the very extent of the business defeats this position of the defendant on this motion for a new trial, because the jury may reasonably have been led to the conclusion that the applicant could not have expected to conceal from the defendant corporation transactions so extensive as these had been, and also so notorious as the evidence shows they were; so that, for this very reason, the jury might well have found that the very facts urged by the defendant defeated its proposition that this answer was given with any actual intent to deceive. Moreover, it is difficult to accept the theory which seems essential to an intent to deceive, that the applicant could have supposed that, with reference to a business of this character which had been so long discontinued, he would in any way influence the defendant corporation against the issuing of a policy to him, or affect its rates, by failing to disclose the facts as they in truth existed. There is enough to sustain the verdict of the jury on this branch of the case.

The other reason given by the defendant why the court should grant a new trial arises as follows:

The application contained the following questions and answers:

"Int. 7. Have you ever used spirits, wine, or malt liquors? Ans. Yes. Int. 8. Have you ever used them to excess? Ans. No. Int. 9. Do you now use them? Ans. Have no habit; now and then may take a cocktail or wine at meals. Int. 10. If you have ever used them to excess, give full details of how often, and how long since. Ans. No."

There was a great deal of evidence tending to show that, on several occasions, the applicant was overcome by the use of intoxicating liquors as a beverage to an extent which should properly be designated as extreme; and, indeed, the testimony of this character was so marked that, except for the rules which were laid down in *Northwestern Life Ins. Co. v. Muskegon Bank*, 122 U. S. 501, 7 Sup. Ct. 1221, and in *Insurance Co. v. Davey*, 123 U. S. 739, 8 Sup. Ct. 331, which we were compelled to give to the jury, the court would feel that the verdict ought not to stand. But, although the form of the interrogatories varied, yet, in connection with the answer which the defendant accepted,—“have no habit,”—they were in substance the same; so those rules leave so little for us in this case, and so much

for the jury, as was fully explained in our charge, that we are powerless to act.

The motion for a new trial is denied.

MCDOWELL et al. v. McCORMICK.

(Circuit Court, D. Indiana. November 25, 1898.)

No. 9,626.

SHERIFFS—WRONGFUL EXECUTION OF WRIT OF REPLEVIN—LIABILITY IN TRESPASS.

In the statutory action of replevin in Indiana, the plaintiff is required to state by affidavit that he is the owner, or is lawfully entitled to the possession, of the property described, which is unlawfully detained by the defendant; and the writ issued commands the officer to take the property from the possession of the defendant named therein. *Held*, that such a writ confers no authority on the officer to take the property from any other person than the defendant named, and if he executes it by seizing and taking the property by force from a stranger to the writ, who is the bona fide owner and in the actual possession, he may be sued in trespass therefor in a federal or other court having jurisdiction.

On Demurrer to Complaint.

John H. Bradley and David H. Robbin, for plaintiff.

A. C. Harris, for defendant.

BAKER, District Judge. The question presented by the demurrer is this: When a replevin suit is begun in a circuit court of this state by one person against seven others, as sole defendants, and a writ of replevin is issued to the proper sheriff, commanding him to take specified personal property from the possession of the defendants who are named in the writ, may the sheriff be sued in trespass in this court, if he executes such writ by seizing and taking by force from a stranger to the writ, who is the bona fide owner and in actual possession of it, the property named in such writ? It is a rule of law of universal application that if the court issuing the process had jurisdiction, in the case before it, to issue that process, and it was a valid process when placed in the hands of the officer, and if, in the execution of such process, he keeps himself strictly within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the court which issued it, but in all other courts. Of this class was a writ of replevin at common law which commanded the officer to seize and take into his possession the personal property named in the writ, and to summon some person therein named. The writ did not name the person from whose possession the property was to be taken by the officer. In this state the common-law action of replevin is abolished, and a statutory method of procedure is provided for the recovery of any personal goods which are wrongfully taken or unlawfully detained from the owner. Before any process for the taking and delivery of personal property can be issued, the plaintiff, or some one in his behalf, must make and file with the clerk an affidavit showing that he is the owner or is lawfully

entitled to the possession of the property, particularly describing it; that the same has not been taken for a tax, assessment, or fine, or seized under an execution or attachment against the property of the plaintiff, or, if so seized, that it is exempt from such seizure; that the property has been wrongfully taken and is unlawfully detained by the defendant, or is unlawfully detained by him; and the estimated value of the property. Upon the filing of such affidavit the clerk issues a writ for the seizure of the property, and the delivery thereof to the plaintiff. If, within 24 hours after its seizure, the defendant executes the undertaking required by statute, the sheriff must return the property to him. If, however, the defendant fails to give the required undertaking, the sheriff is then directed to deliver the property to the plaintiff, if he gives the required undertaking. The action in this state must be against the person having possession of, and unlawfully taking or detaining, the personal property to be recovered. The statute requires the plaintiff, as a condition precedent to the issuing of the writ, to show by affidavit that the property sought to be recovered is in the possession of the defendant, from whom the officer is required to take it and restore it to the plaintiff upon his giving bond, if the defendant fails to give the undertaking required for its retention. If the plaintiff recovers judgment for the property, he is entitled to damages for its wrongful taking or unlawful detention. If he fails, the property is to be restored to the defendant, who may recover damages for the taking. A return of the property is awarded, and, if the property is not returned pursuant to the judgment, the defendant has his remedy on the undertaking, as well as a writ *pro retorno habendo*. The statute, in all of its provisions, clearly implies that the property to be recovered is in the possession of the defendant, and that it is to be taken from his possession by the officer. The form of the writ, and the mandate to the sheriff therein contained, is that he take from the possession of the defendant, and not from the public generally, the property described in the writ. The person from whom the goods are taken is the one to whom the plaintiff, by the terms of his undertaking, is to return the property, if a return be adjudged. The mandate of the writ is not, like that at common law, simply a command to take in specie certain specified goods and chattels, but the command is to take the goods and chattels in specie from the defendant, and from no one else. The writ confers no authority upon the officer to take the goods and chattels described in it from any other person than the defendant therein named. If he does so, he acts in excess of his authority, and becomes a trespasser. The writ is no protection to him, for the plain reason that it specifically limits his right to take the property to a taking from the defendant, and from none other. If the property has been fraudulently transferred to, or wrongfully placed in the possession of, a stranger to the writ, he could not successfully complain, if the property were seized and taken from his possession by the officer. This, however, would arise, not from the writ being a direct authority to take the property from the possession of such wrongdoer, but from the fact that the wrongdoer would not be injured by the seizure and taking of the property from his possession. In the present

case, however, the plaintiffs allege that they were the bona fide owners of the property mentioned in the writ, and were at the time in its actual possession when the property was forcibly and wrongfully seized and taken from them by a writ to which they were strangers. For this trespass an action lies, and the writ is no protection to the officer. This court, as a court having concurrent jurisdiction with the courts of this state, possesses the same authority as would any court of the state to entertain jurisdiction of this cause. The demurrer must be overruled, and it is so ordered.

WAGNER v. NATIONAL LIFE INS. CO. OF MONTPELIER, VT.

(Circuit Court of Appeals, Sixth Circuit. November 9, 1898.)

No. 497.

1. RELEASE—AVOIDING FOR FRAUD IN ACTION AT LAW—PLEADING.

It is proper, in a suit at law, for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud is in the execution or in misrepresentation as to material facts inducing execution, where the issue involves simply a question of fraud between the parties.

2. SAME—IMPEACHMENT FOR FRAUD—FALSE STATEMENTS.

To entitle a plaintiff to avoid a release for fraud, in law or equity, because of untrue statements knowingly made by defendant, it must appear—First, that defendant made such statements intending that the plaintiff should act upon them; and, second, that they were a substantial inducement to the execution of the release.

3. SAME.

To render a false statement ground for the avoidance of a release, it must appear, not only that the person who executed the release would not have done so had he been told the truth, but also that he would not have done so had no statement been made.

4. SAME.

The holder of a policy of life insurance determined to surrender it, and obtain its surrender value, at the same time taking a new policy. For the purpose of effecting the change, he went to the office of the agent of the company, where he was examined by its physician, who rejected him as an applicant for new insurance, on the ground that he had an affection of the heart. At the same time, the physician stated to him that the disease was not in itself dangerous, and would not cause his death, but would prevent him from obtaining insurance in any other company, and advised him to retain the policy he then held. The insured, however, surrendered the policy, and he and his wife, who was the beneficiary, executed a release thereon. In fact, his disease, as the physician knew, was likely to cause his death at any time, and did so within a few days thereafter. *Held*, that the wife could not avoid the release because of the false statement made by the physician, which was not the inducement to its execution, nor intended to be so, although, if the physician had stated the truth within his knowledge, it might have prevented the surrender of the policy.

5. SAME—EXECUTION WITHOUT READING.

The beneficiary of a policy of life insurance, who executed to the company a release of liability thereon upon its surrender, cannot avoid such release on the ground that she signed it without reading, at the instance of her husband, who was the insured, and in the belief that it was merely a receipt for accrued earnings, and left the policy in force, where she was able to read, and no fraud was practiced upon her by the company or its agent.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

This action was brought by Mary L. Wagner against the National Life Insurance Company of Montpelier, Vt., to recover \$5,000 upon a policy of life insurance issued upon the life of her husband, Robert Wagner. Robert Wagner died on the 10th day of December, 1894, and, after due proof of loss and refusal to pay by the company, the writ was issued and the declaration filed. The defendant filed a plea of the general issue, and, as the Michigan practice requires, gave notice of an intention to prove a surrender of the policy in bar of the action. The plaintiff offered in evidence the policy, which, at the request of plaintiff, had been produced by the defendant, in whose possession it was. The defendant objected to the introduction of the policy, for the reason that it bore the following indorsement:

"Detroit, November 26, 1894.

"Received from the National Life Insurance Company \$1,060.61 in full for all claims under this policy, No. 45,801, now terminated by surrender for cash.

"[Signed]

Robert Wagner.

"Mary L. Wagner.

"In presence of

"McC. C. Le Beau."

The policy was admitted in evidence, subject to objection and exception. The only witnesses to the surrender and the accompanying circumstances were Mrs. Wagner, called in her own behalf, and Le Beau, the agent, and Dr. Miner, the medical examiner, called by the company. Mrs. Wagner was permitted to testify to a conversation with her husband before going to the agent's office. She said: "He asked me if I would be willing to let him have the accrued money on his life insurance; if I were willing he should have this money; that would help him out of some financial difficulty. And I remarked to him at the time, as we went towards Mr. Le Beau's building, 'You do not intend to drop your insurance, do you?' And he answered me very impetuously, as he would if he thought I misunderstood him, and he said: 'No; not at all. I have not the slightest idea of doing such a thing. I simply want you to give me the interest or accrued money; that is all I want. Your life insurance will go on just the same.' And it was then I said, 'Very well, that is all I ask.' I did not mean to ask a foolish question; I simply wanted to be satisfied; and we entered the building, and from that moment I was under that supposition. I never doubted it again. I did not question the thing afterwards as I might have done." The witness then described the conversation of the agent, Le Beau, and the physician, Dr. Miner, with Wagner, after the medical examination. She said: "They both came out of the room together. I don't remember anything that they said particularly to me. They said to Mr. Wagner: 'Well, Mr. Wagner, are you fully resolved to do this thing? Have you made up your mind to do this thing?' I think Mr. Le Beau asked him that question, if he wanted to do this; of course, as I supposed— (Objected to.) Q. What did Mr. Wagner say? A. He said, 'Yes,' he did. Then Mr. Le Beau told him to come into the room,—this private room,—and they would settle matters up; and the three went in together. I cannot remember how long they were in there. The next one I saw, I think, must have been Mr. Le Beau. He came out of the room with a folded document in his hand. The document was folded like this. And he stood in front of me, and asked me my name. 'Your name is Mary L. Wagner?' he said; and I said, 'Yes,' and he said, 'Will you please sign here, Mrs. Wagner?' And I signed the document where he indicated, and I did not look at anybody else, and I had not looked at anybody else, except Mr. Wagner. After signing, I looked up and saw Mr. Wagner's condition, which very much frightened and astonished me. I saw that something dreadful had happened. I was positive of that when I saw his face. I knew him well enough to know when he was excited; that he would look like that only under very strange circumstances. Large beads of perspiration were on his forehead, his eyes were set, and his color was gone; and I knew he was very much excited to be in such a state as that. Then I

asked him what was the matter, 'What does all this mean?' And he replied, 'They won't give me any more insurance;' but he just muttered the words; and then Mr. Le Beau and Dr. Miner told me why they would not give him any more, and they went into the particulars of the case. They went into the particulars of the condition of his heart; told me that it was enlarged, and that his life was not a good one, that they could not insure it; and Dr. Miner used all the medical terms such as are used in describing the conditions of a person's heart. I cannot remember those. I know he went into all the particulars of this thing every way; told me how he was. I was very much astonished and excited to think he would do such a thing to a man who was already just crazy with excitement, being told such a thing; and I tried to finish the business arrangements just as quickly as I could, and get him out of there. That was my idea,—to get him out of there as quickly as possible. And I said, 'Mr. Le Beau, if you cannot insure Mr. Wagner, there are other companies that will.' And he remarked, 'No,' his case was not a good one, it was utterly impossible to overcome that verdict; the reports would go all over the country, that it was a report that every company would hear of; that he would not be taken again. And then, in order to say something and get away, I said, 'All right, if he cannot be insured, perhaps I can get my life insured;' and I got him out of there as soon as I could. I saw that he was not fit to speak to; that I could not talk to him; and I did not try to say a word. We got on the elevator, and came down, and I did not say anything to him until we got home." The next day, Mr. Wagner applied to Mr. Le Beau to withdraw the surrender, and Mr. Le Beau said it was too late for him to act in the matter, and that he would refer the matter to the company, which he did, and the company declined to reinstate Wagner. Wagner's death from heart disease occurred within 10 days from the date of the surrender. The check was duly tendered to the company before suit brought.

The account given by the agent of the company, Le Beau, was as follows: "Mr. Wagner first spoke to me about the matters in question in this suit about the 18th or 20th of August, 1894, in my office. I was at that time state agent for the defendant company. He told me then that, when his policy became due, he should surrender for cash. The matter next came up, as I recall it, on the morning of the 26th of November, between ten and eleven o'clock. He said that he had come to fix that matter up. He had got to surrender. I stated to him I thought it was a most peculiar proceeding for a man in his condition. It was easily seen he was in a very bad condition, and I told him it was a peculiar proceeding for him to come to an insurance office and surrender his life insurance. He made the statement that he was not feeling very well; that he had been to a wedding on Saturday night. I think he said his own son was married at Cleveland, and he was up pretty late, and had had a sinking spell. I told him I thought so; he had that appearance. He said he would be all right in a day or two. I says, 'Mr. Wagner, that is the most absurd thing, the most foolish thing, I can imagine.' 'Well,' he said, 'I have got to have it. I have made my arrangements for it, and I have got to have it.' Then I says, 'Now, Mr. Wagner, if you insist upon this matter, you had better make application for some term or cheap insurance to protect your family in the meantime.' Well, he wanted to know what it would cost. Of course, the premium he was paying was high,—some three hundred and odd dollars. I told him the price, and he said, 'All right, I will do that.' I was as well aware then as now that he could not get insurance, but I had an idea that it would appease his desire, and withdraw him from that policy. When I returned from dinner, the doctor had examined him. * * * I called Mr. Wagner in, and told him the doctor said it would be impossible to write him any more insurance, and the best thing he could do was to keep what he had. And he said he could not do it. And I said, 'Wagner, I would mortgage my farm in order to do it.' I said, 'I would rather pay your family \$5,000 in a year than to pay your cash surrender now.' And he says, 'It don't make any difference; one thousand five hundred dollars is worth more to me now than five thousand dollars will be in two or three years.' And there was no further argument. I saw there was nothing I could do that would induce him to with-

draw his determination. Thereupon I told him, 'If you are determined upon surrendering this, call Mrs. Wagner.' * * * His wife was there with him; so he stepped to the door, and he called her in my office. I sat down, and filled out the discharge, and had Mr. Wagner sign it, and asked her to sign it. She took my chair in my private office, after which she turned in the chair to her husband, and she said, 'Now, Robert, you haven't got any other insurance?' He says, 'Yes, I have got a two thousand dollar policy here, and two thousand dollar policy over there in the Equitable,' pointing across the way. Something came up whereby Mrs. Wagner—I think she asked the question why they would not insure, or if we would insure her. I asked her how old she was. And she told me, and I put another question to her, and she answered it, and I told her we could not insure her. She wanted to know why. I told her the rules of the company applicable to women would not allow it. Afterwards I drew the check, and gave it to Mr. Wagner. Mr. Wagner took the check, and went out."

The medical examiner, Dr. Miner, who was the only other witness, gave the following testimony: "Well, upon examining him, I found Mr. Wagner's pulse very weak and very irregular. I then examined his chest, and found he had enlargement of the heart. It was enlarged from half an inch to an inch, so that the apex beat,—that is, the part where the heart strikes on the chest,—instead of beating in its normal position, was from an inch to an inch and a half to the left, and down about half an inch, which is indicative of enlargement of the heart. I also found a slight murmur or blowing sound, that shows the valves of the heart do not close properly. In other words, he had valvular lesion, enlargement of the heart. * * * So, I finished making my examination; and then I opened the door, and I saw Mr. Le Beau, and I called him in, and I says, 'We can't take this man; we cannot take Mr. Wagner.' And he says, 'Why not?' I says, 'He has a heart trouble, and he is not a good risk.' * * * And then Mr. Le Beau said that I would have to pass upon Mr. Wagner's risk at once, because, if he were not a good risk, it would not be proper to let him give up the policy he then had. * * * So he called in Mr. Wagner, and told him. He said that I didn't find him just right. And then I said to Mr. Wagner: 'I see you are worried about this. It is unnecessary. Your condition of the heart is not a condition of the heart that will ever kill you. You may live just as long or longer than I or any other man.' Then he says: 'What is the trouble with it?' And I says: 'Nothing, only this; the insurance companies do not accept any risks where there is an affection of the heart or kidneys, unless it may be what is called functional trouble; that is, not consequent upon any condition of the heart or interferes with its action, but it must be an organic condition that may produce death at any time.' 'Now,' I said, 'you will live just as long as any other man; but, if you happen to get pneumonia or typhoid fever, your condition of the heart is one that will have to be considered. It may be serious, and it may not, but that is about the only trouble you will ever have from your heart. Don't give it any concern whatsoever.' That was not true what I told him, as it was a condition he should be concerned about, and it was a condition of the heart that was apt to be followed by sudden death at any time, but I did not wish to annoy him. That is a rule of all physicians. It is not proper to tell a man with a heart trouble, but we tell his family if we can; and that is all there is of it. I felt I had my duty to do towards the company, and I felt I had done it towards Mr. Wagner. I says, 'It is very wrong of you to let your policy go in that condition, because you cannot get insurance from any other company.' 'Oh,' he said, 'I will be all right in a few days.' I says, 'You are very foolish to throw up this policy, to let your policy go, because, while you may live just as long as any other man, you cannot get insurance in your present condition.' Shall I go on and state what I said further? Q. Yes; you might as well go on and tell all. A. Then I said, 'You are making a big mistake to accept this cash surrender.' He started talking confidentially to me, and he says, 'Doctor, one dollar is worth to me more now than five dollars will be in three or four years.'"

Counsel for the defendant moved for a direction to the jury to return a verdict for defendant, contending, among other things, that the surrender

was valid in law, and could only be impeached in a court of equity, and that, even if its validity could be investigated here, the evidence was insufficient to avoid the surrender.

F. A. Baker and H. E. Spalding, for plaintiff in error.

Edwin F. Conely, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge (after stating the facts as above). The first question for our consideration is whether the surrender of the policy, admitted to have been signed by Wagner and Mrs. Wagner, could be impeached for fraud in a court of law. The issues as to the validity of the release were two: First, that it was obtained from the plaintiff by fraudulent representation, made on behalf of the defendant company, as to Wagner's physical condition; and, second, that Mrs. Wagner was misled as to the character of the instrument, so that she never, in fact, assented to the surrender. The two grounds are quite different. The latter goes to the execution and delivery of the instrument with a contracting mind, and is analogous to the plea of non est factum at common law. The former goes to the inducement to an act, the conscious doing of which it assumes. It is not disputed, and could not be, that, under the most stringent common-law rules of pleading, a replication of the latter kind to a plea of release was permissible. But it is contended that, where the conscious execution of a release is admitted, it can be avoided for fraud in inducing the act only in equity, and, therefore, that the court was right in holding that there was nothing in the evidence as to the false statements made concerning Wagner's physical condition which the jury could consider.

The question presented is not free from difficulty. The law side of a court of the United States is a court of common law with no equity jurisdiction, except such as the common-law courts of England exercised before the acts of parliament, which, in terms, gave them certain equitable powers. A close study of the two concurrent systems of law and equity between Lord Mansfield's time and the passage of the act of 1854 (17 & 18 Vict. c. 125), which for the first time gave the courts of law power to entertain equitable pleas and replications, would doubtless show that the more enlightened and liberal course of the chancellor in disregarding forms, and looking to the substance, and in avoiding circuity of action, by settling controversies in one suit, had a direct effect upon the procedure in the common-law courts. Certain it is that early in this century, and perhaps earlier, the common-law courts began to assert what they called an equitable jurisdiction to defeat certain inequitable defenses. The manner of doing this we shall refer to later. By the judicature act of 1873, the courts of law finally obtained full equitable powers. It is not always an easy matter to determine whether the procedure approved in cases decided in this period of transition is based on common-law or equitable principles. When we consider the American authorities, we are in still greater perplexity, because in some states the distinction between law and equity pleading and practice has been abolished as far as possible;

in other states it has been modified; and in others it remains comparatively intact. This much must be said, however: that, although the distinction between law and equity procedure has always been maintained in courts of the United States, it is natural and it is proper that the relaxing of the rigid lines between the two jurisdictions in England and in most of the states of this country should render courts of the United States, sitting as courts of law to-day, less acute than in earlier days to exclude pleas and replications having an equitable flavor, which would have been of doubtful validity in a court of law presided over by Lord Holt or Sir Matthew Hale, or even by Lord Kenyon or Lord Ellenborough. Even courts of common law must partake of the spirit of progress.

At common law, a release of a right of action, whether founded on simple contract or specialty, had to be by deed, under seal, to be of any efficacy. Leake, *Cont.* 794; *Co. Litt.* 264a, 291a. Whether one sued upon his deed might not avoid it and defend against it on the ground that it was procured from him by fraud not going to its execution and delivery, may be open to question. In *Taylor v. King*, 6 *Munf.* 358, it was sought to defend against a deed in an ejectment suit on the ground that the defendant had been defrauded into making the deed by false statements in respect of the consideration. The court refused to consider the special finding of the jury showing such fraud, saying:

"Such circumstances go to show a want of consideration; and a defendant cannot avoid a solemn deed on that ground by parol in a court of law. In that court, and on such an instrument, the principle that fraud and covin vacates every contract is to be taken in subordination to another principle, namely, that a party is estopped from averring a matter of the kind against a specialty."

The same doctrine is held in *Wyche v. Macklin*, 2 *Rand.* 426, in *Vrooman v. Phelps*, 2 *Johns.* 177, and in *Dorr v. Munsell*, 13 *Johns.* 430, which were suits in debt on bonds. And yet in *Chit. Pl.* (11th *Am. Ed.*, from 6th *Eng.*) 962, a form of plea against debt on a bond is given as proper, in which the defendant avers that the bond was obtained from him by the plaintiff by fraud, covin, and misrepresentation, sets out specifically the misrepresentations, avers that the deed was executed in confidence of such misrepresentations, and concludes with the statement that the deed is void. This form is criticised by Mr. Perkins, the American editor, and by Chief Justice Gibson, in *Stubbs v. King*, 14 *Serg. & R.* 208; but it is noteworthy that no English case is cited to show that it is erroneous, and there are some expressions of English judges which seem to justify it.

Thus, in *Edwards v. Brown* (1831) 1 *Crompt. & J.* 312, an action in debt on a bond, the defendant, under a plea of non est factum, sought to prove that the defendant had been induced by fraud to execute the bond. The court held that this could not be done, Bayley, B., saying:

"I agree with my Brother Russell that whatever shows that the bond never was the deed of the defendant may be given in evidence upon non est factum. But if the party actually executes it, and was competent to execute it, and was not deceived as to the actual contents of the bond, though he might be misled as to the legal effect, and though he might have been entitled to avoid

the bond by stating that he was so misled, it nevertheless became, by the execution, the deed of the defendant, and he is not at liberty, upon the plea of non est factum, to say it was not."

See *Hirschfeld v. Railway Co.*, 2 Q. B. Div. 1.

But, whatever the proper rule may have been as to other forms of specialty, the history of the course of the English and American courts in defeating releases which would have been set aside in equity justifies the conclusion that there was more liberality in allowing replications to avoid them than in the case of other specialties. The inconvenience of compelling a plaintiff in an action at law, who was met by a plea of release, to resort to an expensive and vexatious proceeding in equity to set it aside for fraud, led courts of law to exercise what has already been alluded to as their equitable jurisdiction to defeat the plea. The step was first taken in suits by an assignee of a chose in action which were brought in the name of the assignor to defeat the plea of a release by the assignor collusively and fraudulently executed to the debtor after notice of the assignment. The court did not allow a replication to be filed setting out the facts which ought, in justice, to avoid the release, but, upon a rule to show cause and affidavits, refused to permit the defendant to continue his plea on the record, and set it aside. *Legh v. Legh*, 1 Bos. & P. 447; *Payne v. Rogers*, 1 Doug. 407; *Innell v. Newman*, 4 Barn. & Ald. 419; *Manning v. Cox*, 7 Moore, 617; *Mountstephen v. Brooke*, 1 Chit. 390; *Jones v. Herbert*, 7 Taunt. 421; *Furnival v. Weston*, 7 Moore, 756; *Doe v. Franklin*, 7 Taunt. 9; *Phillips v. Clagett*, 11 Mees. & W. 83; *Rawstorne v. Gandell*, 15 Mees. & W. 303. The jurisdiction was also exercised in other cases where the plaintiff was really only a nominal party, with no interest in the suit, and had given a release, and also where there were joint plaintiffs, and one had fraudulently and collusively given a release to the defendant. The most satisfactory statement of the reason and limits of the jurisdiction is found in Baron Parke's judgment in *Phillips v. Clagett*, *supra*. It was held that the proof of the fraud in the release and of the defendant's connivance in it must be clear, or the court would not assist the plaintiff.

There is good ground for believing that when the fraud was committed by the defendant in procuring the release directly from the plaintiff, and not from a third person, this matter could be set up by replication; and this, even if the fraud did not go to the execution of the release, but only consisted of misrepresentation of material facts. This might well have been so, for it involved a much less departure from the common-law procedure to allow the plaintiff to avoid his own deed of release for fraud in the very case in which it was pleaded between the only possible parties in interest than it did to defeat a release executed by a third person who was not really a party in interest at all.

In the case of *Benson v. Bennett*, tried before Sir James Mansfield, C. J. (49 Geo. III.), and reported in a note to *Alner v. George*, 1 Camp. 392, 394, the action was for money had and received by a mariner against the owner of a privateer to recover prize money. The defendant pleaded in bar a receipt signed by the plaintiff for \$500, declared to be in full of all demands in respect of the prize. The plain-

tiff was permitted to show that the receipt was obtained by a fraudulent representation as to the total prize money, and it was held that the receipt was not binding. It does not appear whether the so-called "receipt" was under seal or not.

In *Wild v. Williams*, 6 Mees. & W. 490, a suit for work and labor, Baugh had executed a release to Williams, which Williams pleaded in bar. Wild applied to the court for an order setting aside the plea, on the ground, established by Baugh's affidavit, that Williams had obtained the release by fraud from Baugh. The court refused to make the order, Lord Abinger saying: "If this was a fraudulent release, the plaintiffs can raise that issue on the plea." Baron Parke said: "If there was fraud on Baugh himself, so that he is not bound by the release, that will be a good replication."

In *Richards v. Turner* (1856) 1 Fost. & F. 1, the action was for work and labor and money paid. The plea was release by the plaintiff, and the replication that the release was obtained by fraud upon the plaintiff. In holding that the evidence did not support the replication, Pollock, C. B., said:

"The only fraud that could avoid the release would be misrepresentation as to the contents of the deed or some fraudulent misrepresentation of a matter of fact to induce the plaintiff to execute it."

It is true that this last case was tried after the passage of the procedure act of 1854 (17 & 18 Vict. c. 125, § 83), in which the plaintiff was given express authority to avoid a plea on equitable grounds, provided he began his replication with the words "on equitable grounds." The replication in the case cited, however, does not appear to have been on equitable grounds.

In *Hirschfeld v. Railway Co.*, 2 Q. B. Div. 1, a reply to a release under seal was held good in which it was averred that it had been obtained by misrepresentation of a material fact inducing its execution. The reply was not in the form required by the statute, if equitable grounds were relied on.

Chitty, in his work on Pleading (11th Am. Ed., from 6th Eng., p. 1157), gives as a proper replication to a plea of release not only non est factum, but also that the release was obtained from the plaintiff by fraud or duress. By reference, Mr. Perkins, the editor, makes his criticism upon the plea of fraud to a specialty already mentioned apply to this replication. For the reasons given and on the authorities cited, we think the criticism is not entitled to the same weight in respect to avoiding releases as other specialties. It is worthy of comment that the common-law procedure act of 1852 (15 & 16 Vict. c. 76, Schedule B, §§ 50, 51), which was merely declaratory, except as to form, of the then procedure, gives two replications to a release,—one, that it "is not the plaintiff's deed"; and the other, that it "was procured by the fraud of the defendant."

In courts of this country, the effort of the English courts of law, early in this century, to avoid circuity of action in respect to fraudulent releases, has been approved. *Welch v. Mandeville*, 1 Wheat. 233; *Strong v. Strong*, 2 Aikens, 373; *Loring v. Brakett*, 3 Pick. 403; *Eastman v. Wright*, 6 Pick. 316, 322; *Webb v. Steele*, 13 N. H. 230. The courts did not find it necessary, however, even in the case

of fraudulent releases by assignors and other nominal plaintiffs, to resort to the extraordinary method of setting aside the obnoxious plea of release by interlocutory order on affidavit, but allowed the matter in avoidance of it to be set up in a replication, and the issue to be tried by a jury.

In *Eastman v. Wright*, 6 Pick. 316, 322, the court say:

"In England, when a nominal plaintiff, or one of several plaintiffs, releases an action in fraud of the party in interest, the courts directly interfere and set aside the release. But in this state the courts never have exercised this power. The release may be avoided if fraudulent, but the question of fraud can only be tried by jury. In the case at bar, the question was properly submitted to the jury, and we think there is no reason to complain of their verdict."

The distinction between suits at law and in equity, in Massachusetts, it may not be always safe to follow, because of the absence of any equity jurisdiction in its courts for many years. Still, in a line of cases, all decided since the supreme judicial court of that state has had equity jurisdiction, that court has approved the procedure by which a release can be avoided by a replication in which the plaintiff sets up fraud in the procurement of the release. *Smith v. Inhabitants of Holyoke*, 112 Mass. 517; *Mullen v. Railroad Co.*, 127 Mass. 86; *Trambly v. Ricard*, 130 Mass. 259; *Squires v. Amherst*, 145 Mass. 192, 13 N. E. 609; *O'Donnell v. Clinton*, 145 Mass. 461, 14 N. E. 747; *Rosenberg v. Doe*, 148 Mass. 560, 20 N. E. 176; *Id.*, 146 Mass. 191, 15 N. E. 510; *Bliss v. Railroad Co.*, 160 Mass. 447, 36 N. E. 65; *Drohan v. Railway Co.*, 162 Mass. 435, 38 N. E. 1116. In many of these cases, the releases in question were under seal; in others, they were not. In many of them, the evidence of fraud would have been admissible under a replication of non est factum; in others, it would not have been, notably in the last case cited, that of *Drohan v. Railway Co.* In none of them was the distinction between fraud in the execution and fraud in the inducement regarded as material, except where it became necessary to determine whether money paid on the release must be returned before avoiding the release, as in *Smith v. Inhabitants of Holyoke* and *Mullen v. Railroad Co.* In *O'Donnell v. Clinton*, the distinction was referred to, and the authorities were cited; but the court declined to decide on which side of the line the case before it fell, and sustained the attack upon the release solely on the ground of fraud. The courts of New Hampshire, where law and equity are still kept distinct, approve the same practice in respect to avoiding releases at law as that which obtains in Massachusetts. *Hoitt v. Holcomb*, 23 N. H. 555. The same is true in Michigan (*Stone v. Railway Co.*, 66 Mich. 76, 33 N. W. 24; *Averill v. Wood*, 78 Mich. 342, 44 N. W. 381); and in Illinois (*Railroad Co. v. Welch*, 52 Ill. 183; *Railroad Co. v. Lewis*, 109 Ill. 120). The supreme court of the United States, in *Railway Co. v. Harris*, 158 U. S. 326, 15 Sup. Ct. 843, approves the practice, and cites many of the foregoing cases, though it is to be said that probably, on the evidence brought out in that case, a replication of non est factum might have been supported. In the code states, there are also many cases of like character, which are not without weight on the question before us, because, even under a code, the necessity for resorting to affirmative equitable remedy in cases

where a merely negative defense will not suffice, still exists. *Fuller v. Insurance Co.*, 36 Wis. 599; *Lusted v. Railway Co.*, 71 Wis. 391, 36 N. W. 857; *Peterson v. Railway Co.*, 38 Minn. 511, 39 N. W. 485; *Mateer v. Railway Co.*, 105 Mo. 320, 16 S. W. 839; *Railroad Co. v. Doyle*, 18 Kan. 58. In *Fuller v. Insurance Co.*, it will be seen that the supreme court of Wisconsin considers the question as a matter of common-law pleading, and finds no aid in the Code of the state.

Except for the peculiar sanctity anciently attaching to a sealed writing at common law, which is now disappearing, it is difficult to see how there could be any doubt about the right in an action at law to avoid a release by a reply of fraud. The release or surrender is a contract (and in the case at bar not under seal), in which, for a valuable consideration, the releasor agrees to give up all claim and interest in his right of action. In the case of a contract of sale of personal property, a party may, by tendering back either the money or the property, as the case may be, rescind the sale for fraudulent misrepresentation as to any material fact inducing him to enter into the contract, and, if sued on the contract, may plead such rescission and justify it. Why may not one on the same ground and in the same way rescind a release, or, when it is produced against him as a bar to an action, avoid it by showing the fraud? In this case the Wagners tendered the money received to the company, and thereafter declined to acknowledge its validity. This is an ordinary remedy as to all other contracts. *Leake*, Cont. 320, 321. Why not as to this? On page 802, Mr. Leake says:

"In the case of a releasing creditor having been induced to give the release by the fraud of the debtor, he may avoid it at his election without the aid of the court, and he may meet a plea of release in an action by replying that the release was obtained by fraud."

Our conclusion is, therefore, that it is proper in a suit at law for the plaintiff to meet a plea of release by a replication that the release was obtained by fraud, whether the fraud is in the execution, or in misrepresentation as to material facts inducing execution. We are glad to come to this conclusion, because it avoids circuitry of action, and thus facilitates the administration of justice. Of course, cases may be conceived where the avoiding of a release may concern the rights of others not parties, or may involve the application of peculiarly equitable doctrines of confidential relations and the like, and thus present issues which only a chancellor, with his flexible procedure and careful discrimination, can properly adjust and decide. In such cases the parties can be remitted to equity. But, where the issue is simply one of fraudulent misrepresentation, it may be as well tried to a jury as to a court of equity, for fraud is an issue of which courts of law and equity, from time immemorial, have had concurrent jurisdiction. We find no reason, therefore, to modify the remark made by this court, speaking through Judge Lurton in *Lumley v. Railroad Co.*, 43 U. S. App. 476, 489, 22 C. C. A. 67, and 76 Fed. 73, where he said:

"If the release had in fact been procured by fraud, he [the plaintiff] could have shown this at law, if the fact that the release was under seal had been out of the way."

The remark was perhaps not necessary to the case then before the court, but in this case, where the question calls for decision, we have no difficulty in confirming it.

We come next to the question whether there was any evidence to impeach the surrender. The charges of fraud are two: First, that the physician, Dr. Miner, speaking for the company, told Wagner that the condition of his heart was not dangerous, and that he might live for years, when he knew that his heart was in very bad condition, and that death was probable at any time, and that this false statement induced Wagner to insist upon the surrender; and, second, that Mrs. Wagner signed the surrender without knowing its contents, and induced by a misstatement of her husband to believe that it was not a surrender, but a mere arrangement by which he was to receive certain cash due on the policy. Mrs. Wagner was the beneficiary in the policy, and she alone had power to surrender the policy. *Bank v. Hume*, 128 U. S. 195, 9 Sup. Ct. 41. Statements made to her husband could only be made the basis of a charge of fraud on her behalf on the theory that he was her agent in the matter, as he undoubtedly was. It may be conceded that the physician did knowingly misstate to Wagner the seriousness of the condition of his heart. In order that knowingly untrue statements shall justify an action or defense of fraud in law or equity against the maker of them, it must appear—First, that he made them intending that the person complaining should act upon them; and, second, that the false statements were a substantial inducement to such action and the resulting damage.

In *Clerk & L. Torts* (2d Ed.) 465, the learned authors say that:

“In order to give a cause of action for deceit, not only must the statement complained of be untrue to the defendant's knowledge, but it must be made with intent to deceive the plaintiff,—with intent, that is to say, that it shall be acted upon by him.”

This principle has frequent application where a statement is made by one person to another, and is acted upon by a third. In such cases the third person must show that the maker of the statement intended such third person to act on it. *Barry v. Croskey*, 2 Johns. & H. 23; *Peek v. Gurney*, L. R. 6 H. L. 377. Where the person acting on the statement is the person to whom it is addressed, and the statement taken by itself is reasonably calculated to induce such action, of course the presumption is that the result was intended by the maker. But this presumption can certainly be rebutted by other circumstances showing that the statements were made with the best motives, and for an entirely different purpose, and that such action as that taken was not intended, but, on the contrary, was, in the presence of the deceived party, in good faith deprecated. It is true that there are many cases in which the principle is broadly stated that the motive of one in deceiving another to the latter's damage is not material, but they are all cases in which the deceiver intended the deceived person to take the action he did take, and sought to escape liability for it on the ground that he intended no injury to the deceived person or benefit to himself from such induced action. *Foster v. Charles*, 7 Bing. 105; *Corbett v. Brown*, 8 Bing. 33; *Polhill v. Walter*, 3 Barn. & Adol. 114; *Derry v. Peek*, 14 App. Cas. 337, 365.

In the case before us, Dr. Miner neither on his own part, nor on that of the company, was under any legal obligation to advise Wagner of the defective action of his heart. The company was making the examination to determine whether it could give Wagner further insurance. It would have discharged its full duty if it had simply rejected his application. The doctor did not take this view, however, but actuated by the highest motives, and for the purpose of preventing Wagner from surrendering his policy, he told him that his heart action was defective, and that he could never get any more insurance, and sought to avoid the injurious effect upon Wagner's heart of such information by false assurances that there was no danger to life involved. Such a course was dictated by the most humane feeling, and justified by the most stringent rules of professional ethics. The event showed that too much was told to Wagner, as it was, for his death can be directly traced to the excitement due to the information he received from the examination. Under these circumstances, it is clear that, in making his untrue statement, Dr. Miner had no intention that Wagner should act upon it by surrendering his policy. Wagner knew that he had no such intention, because the doctor, by everything he said and did, emphatically manifested just the contrary intention. It is a case where the maxim, "*Volenti fit non injuria*," applies.

Again, the untrue statements did not cause the surrender of the policy. "To entitle a plaintiff to sue for a misrepresentation made to him, it is not enough to show that it was followed by damage to him; he must show that the one was the cause of the other; he must establish that, in doing the act whereby he suffered damage, he was '*adhibens fidem*,' relying upon the representation being true." Clerk & L. Torts (2d Ed.) 470. In *Attwood v. Small*, 6 Clark & F. 232, 444, which was a bill to rescind a contract for fraud, Lord Brougham, delivering judgment, in the house of lords, gave as the third and last essential element in the complainant's case "that it should be this false representation which gave rise to the contracting of the other party." *Tatton v. Wade*, 18 C. B. 371; *Edgington v. Fitzmaurice*, 29 Ch. Div. 483; *Peek v. Derry*, 37 Ch. Div. 541; *Smith v. Chadwick*, 20 Ch. Div. 27, 44. Wagner would undoubtedly have surrendered the policy, had the doctor said nothing to him. The doctor said something of his bad condition to dissuade him from the surrender, and, for his own good, misstated its extreme danger. It may be assumed that, if Wagner had known his extreme danger, he would not have surrendered the policy. Does it follow that the doctor caused him to surrender the policy by his misstatement of it? We think not.

In *Brady v. Evans*, 47 U. S. App. 416, 24 C. C. A. 236, and 78 Fed. 558, this court had to consider a closely analogous case. In that case, which was an action for deceit by the depositor in a bank against the directors for false statements as to its condition, we said:

"There can be no recovery unless it can be shown that injury was done and loss occasioned by the false statement relied upon. 'In actions of this sort it was long ago laid down that fraud without damage, or damage without fraud, would not give rise to such an action.' *Derry v. Peek*, 14 App. Cas. 337, 343. It must therefore clearly appear upon the face of the petition that the false statement complained of actually caused loss to the plaintiff.

In this case it appears that, at the time the statement complained of was made, the plaintiff was a depositor in the defendants' bank, and the averment is that he was induced to remain a depositor by these statements. He does not aver that, but for these statements, he would have withdrawn his deposit before the failure of the bank. The date of the statement precludes the possibility that he was induced to make the deposits in the bank, because the deposits were all made before the statement. The fact is, therefore, that he lost nothing by reason of the false statements, unless he would have done something but for the false statements; otherwise, he was not induced to alter his position by the statements, and no loss was occasioned to him thereby. * * * The words of the petition really charge no more than that the plaintiff, being a depositor in the defendants' bank, acquired confidence in its safety from the statements made, whereas, if he had known the truth, he would not have remained a depositor. It is not enough in deceit to show that, if the plaintiff had known the truth, he would have done otherwise than he did. It must appear that he did otherwise than he would have done if the false statement had not been made to him."

In the case at bar, it is apparent that Wagner would have insisted on surrender if the physician had said nothing, and that what the physician said, he said only to prevent surrender, and that, though he misrepresented Wagner's physical condition, Wagner's action would have been the same if he had omitted his misstatements. Therefore they did not cause the surrender, and cannot be made the ground for setting it aside.

The second objection to the surrender is that Mrs. Wagner signed the surrender without knowing that it was a surrender. She says that, from her conversation with her husband before entering the agent's office, she understood that he did not intend to give up his insurance, but that he was merely about to receive "the interest and accrued money" due on the policy, and that upon this supposition she signed the paper handed her by the company's agent without looking at it. There is not the slightest evidence to show that the agent of the insurance company misled her in any way as to the character of the paper she was signing. Indeed, from the trend of the conversation between herself, her husband, the agent, and the physician, as detailed by her, it is difficult to believe that she did not have a clear idea of what she was doing. Giving full credit, however, as we must, in this inquiry, to her statement that she signed the surrender without knowing its contents, we are clearly of opinion that this does not invalidate the surrender, or destroy its effect as a complete bar to action on the policy. The rule to be gathered from the authorities is that neither law nor equity will give any relief to one who, being able to read, signs a paper without reading it, unless it is made to appear that his failure to read is due to the fraud or imposition of the other party.

In *Greenfield's Estate*, 14 Pa. St. 496, Chief Justice Gibson said:

"If a party who can read will not read a deed put before him for execution, or, if being unable to read, will not demand to have it read or explained to him, he is guilty of supine negligence, which, I take it, is not the subject of protection, either in law or equity."

In *Upton v. Tribilcock*, 91 U. S. 45, 50, the supreme court of the United States said:

"It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed

it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission."

The same principle is declared in many other cases. *Sanger v. Dun*, 47 Wis. 615-620, 3 N. W. 388; *Rogers v. Place*, 29 Ind. 577; *Insurance Co. v. McWhorter*, 78 Ind. 136; *Robinson v. Glass*, 94 Ind. 211; *Goetter v. Pickett*, 61 Ala. 387; *Bishop v. Allen*, 55 Vt. 423; *Railroad Co. v. Shay*, 82 Pa. St. 198; *Hazard v. Griswold*, 21 Fed. 178.

The fact that Mrs. Wagner may have been lulled into the belief that the paper was not a surrender by a previous conversation with her husband does not at all prevent the operation of the rule. The company was not responsible for her husband's statements made to her before they entered the agent's office, and out of his hearing. The agent had every reason to believe that Wagner had fully explained the transaction to his wife. In *Roach v. Karr*, 18 Kan. 529, a woman sought to prevent the foreclosure of a mortgage signed and executed by her, on the ground that she could read but little, and that, when she executed it, she asked her husband what it was, and he told her that it did not amount to a row of pins. It was held that, in the absence of any fraud or imposition on the part of the mortgagee, she could not be heard to say, in view of her negligence in not having the paper read to her, that the mortgage was not her mortgage. See, also, *Meka v. Brown*, 84 Iowa, 711, 45 N. W. 1041, and 50 N. W. 46. The law and the evidence did not justify the submission of this issue to the jury.

Finally, it is contended that it was the duty of the agent and the physician to tell Mrs. Wagner of the dangerous condition of her husband's heart before she signed the surrender. Before Mrs. Wagner left the office, and while the transaction was in progress, Mrs. Wagner was told that Wagner's heart action was defective, and that, in consequence, he could get no further insurance in any other company. We do not regard it as important whether this was before Mrs. Wagner signed the surrender, or just after. It was certainly at a time before the transaction was completed by receipt of the check, and when, had Mrs. Wagner chosen to withdraw from the surrender, she could have done so. It is not claimed that the physician misrepresented to her the condition of Wagner's heart.

Our conclusion upon the part of the case already considered makes it unnecessary to discuss the other grounds upon which it is sought to sustain the correctness of the trial court's ruling, and leads us to affirm the judgment of the circuit court, with costs.

CARSON et al. v. NIXON, Collector of the Port and District of Chicago.

(Circuit Court of Appeals, Seventh Circuit. November 22, 1898.)

No. 516.

1. CUSTOMS DUTIES—CLASSIFICATION—CONSTRUCTION OF TERMS USED IN STATUTE.

In order to give a general term used in a tariff law a special or trade meaning, to include only a particular class of articles, it must be shown that prior to the passage of the law such term was, in commerce and trade at all ports and trade centers of the country, a well-known, uniform, and universally accepted designation of such particular class.¹

2. SAME—EMBROIDERED HANDKERCHIEFS.

All embroidered handkerchiefs, whether they are hemstitched, imitation hemstitched, scalloped, initialed, plain, reverse, or otherwise, are dutiable as embroidered handkerchiefs, under paragraph 276 of the tariff act of 1894; the term "embroidered handkerchiefs," in that paragraph, being descriptive, and not a commercial or trade designation.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This is an appeal from a decree of the circuit court affirming the decision of the board of general appraisers as to the classification of certain imported merchandise.

N. W. Bliss, for appellants.

Oliver E. Pagin, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The question in this case is whether, under the tariff act of August 28, 1894, certain imported handkerchiefs, made of flax, cotton, or other vegetable fiber, which were invoiced as "hemstitched and embroidered," "imitation hemstitched and embroidered," "scalloped-edged and embroidered," or "initialed," were dutiable at 50 per cent. ad valorem, according to paragraph 276, as "embroidered handkerchiefs," or at 40 per cent. ad valorem, according to paragraph 258, as "handkerchiefs not specially provided for in this act." The court below affirmed the decision of the board of general appraisers, who held that the word "embroidered," as used in paragraph 276, was descriptive, and included all the articles named. The contention of the appellants is:

"That at and before the passage of the act of August 28, 1894, the term 'embroidered handkerchief' was a well-recognized commercial term, designating a class of handkerchiefs which did not include any of the other well-known classes of such goods, known by other and different commercial designations."

Whether this contention is right is a question of fact, the rule for determining which has been quite distinctly indicated by the supreme court in the recent case of Maddock v. Magone, 152 U. S. 368, 14 Sup. Ct. 588, in which the inquiry was whether, in a commercial sense,

¹ As to use of commercial and trade names in tariff laws, see note to Denison Mfg. Co. v. U. S., 18 C. C. A. 545.

certain articles were to be regarded as toys. An instruction having been asked that the plaintiff was entitled to recover if the articles were known as "toys" in trade and commerce at the time of the passage of the act and prior thereto, the court, in its opinion (page 372, 152 U. S., and page 589, 14 Sup. Ct.), said:

"But the difficulty is that if these articles were only so known in one trade or branch of trade, or in one part of the country,—partially and locally, and not uniformly and generally,—the conclusion announced by the instruction would not follow. Recovery should not be had on a theory involving different rates of duty at different ports of entry, or distinct and differing designations. Plaintiff did not attempt to prove that the articles were handled by toy houses, though evidence was adduced by him that they were known as 'toys,' and bought and sold as 'toy plates,' 'toy teas,' and 'toy cans,' but not by toy dealers, according to defendant's evidence; and if it were admitted that their signification as toys was confined to a particular locality, or to a particular class, as, for instance, to those who imported them (in which case there might be danger that the designation would vary with the rates), and not to those who dealt in them, and that a different meaning obtained elsewhere, or among the latter, then the usage relied on would fail to be made out."

The testimony on which the chief reliance of the appellants is placed, it is to be observed, was given by witnesses examined at Chicago and New York only; and no one of them professed or was shown to have knowledge of a general custom, or undertook to say, either expressly or inferentially, that the term "embroidered handkerchief," prior to the passage of the act of 1894, was, in commerce and trade at all ports and trade centers of the country, a well-known, uniform, and universally accepted designation of a particular class of handkerchiefs, which did not include other classes enumerated above, all of which, it is conceded, were in fact embroidered. A number of witnesses testified substantially to the same effect. For example, Homer A. Squires, who for five years had been in charge of linens and handkerchiefs at the wholesale store of Marshall Field & Co., testified that an article shown was "simply an embroidered handkerchief," was so "known commercially, and that, desiring to obtain that kind of handkerchief from abroad," he would "order it as an embroidered handkerchief," and "would expect to get a handkerchief that was hemmed and embroidered"; but whether that was true of importers and dealers at Boston, Philadelphia, New Orleans, San Francisco, St. Louis, and other ports or places, he was not asked, and he did not profess to know or believe the general custom to be to use the designation for a particular class of handkerchiefs, which did not include other classes of embroidered handkerchiefs. On the contrary, when asked on cross-examination, "Is that the only kind of handkerchief known in trade and commerce as an 'embroidered handkerchief,'" he answered, "That is the only kind known in our house as 'embroidered handkerchief'; that is, the only kind of a handkerchief we would expect to get if we ordered embroidered handkerchiefs." The witness having also stated on cross-examination that there is "a general class" of goods known commercially as "embroidered handkerchiefs," and that handkerchiefs like the exhibits in question "belong to a subclass of the general class of embroidered handkerchiefs," the leading question was asked him:

"Mr. Squires, while you may call them, in keeping stock (all of them that are embroidered), 'embroidered handkerchiefs,' as a matter of fact, in trade or commerce, all importers and foreign exporters and manufacturers and merchants recognize those handkerchiefs as distinct classes of handkerchiefs, and know them commercially, distinguishing between embroidered, hemstitched and embroidered, and scalloped and embroidered, and initialed?"

To that the witness responded, "Yes, sir." Being asked whether, if a customer in this country should order an embroidered handkerchief, the natural inquiry would be, "Do you want a hemstitched and embroidered, or scalloped and embroidered," he answered:

"Well, that is a hard question to answer. We have thousands of customers, and we have to use our judgment as to the class of merchandise they carry. If we had a first-class customer, like Scuggs, Vandervoot & Barney, of St. Louis, if they should telegraph or write us for fifty dozen embroidered handkerchiefs, we would not send them. We would wire them, and ask them whether they wanted scalloped or hemstitched. But, if some little fellow from 'Podunk' would order, we would use our judgment in filling the order."

Reiterating finally the statement that there is a distinct class of handkerchiefs known in trade and commerce as "embroidered handkerchiefs," exclusive of the other classes, the witness said:

"Embroidered handkerchiefs is something that is limited in price. Certain cheap-priced goods you have got to have, and you can only have embroidered handkerchiefs at certain prices, and you could not get hemstitched and embroidered to sell at five cents. We call these cheap ones 'embroidered handkerchiefs' only."

Edwin T. Lloyd, buyer of handkerchiefs for the appellants, in the course of his testimony said that, if an order was sent abroad for an embroidered handkerchief, it would not, he thought, be at all reasonable to expect in return a hemstitched and embroidered, or scalloped and embroidered, handkerchief. On the contrary, the witness Peter B. Steele, of the firm of Dunham, Buckley & Co., New York, to the question, "If there are handkerchiefs invoiced as embroidered, are they hemmed or hemstitched?" answered:

"We never have embroidered handkerchiefs hemmed. They are either hemstitched or scalloped. We never have such a thing as a hemmed embroidered handkerchief."

The testimony of other New York witnesses, though not directed specifically to the point (doubtless because taken in another case, and stipulated into this), is inconsistent with the theory that there is a distinct class of handkerchiefs, known as "embroidered," which does not include the other classes in question. Though called to testify about the different classes and commercial designations of handkerchiefs and though they explain what is meant by "hemstitched," "hemstitched and embroidered," "scalloped," "embroidered and scalloped," "imitation hemstitched," "hemstitched and initialed," and all agree that a hemstitched and embroidered handkerchief is one which is both hemstitched and embroidered, and not one which is only embroidered, they do not say or intimate that there is a distinct and limited class, known as "embroidered handkerchiefs," which does not include other classes which are in fact embroidered. We agree with the general appraisers:

"It was manifestly the purpose of congress, in changing the provision for 'embroidered and hemstitched handkerchiefs' in paragraph 373, Act Oct. 1, 1890, to 'embroidered handkerchiefs,' in paragraph 276 of the new act, to include all embroidered handkerchiefs, whether they are hemstitched, imitation hemstitched, scalloped, plain, reverse, or otherwise. This is plain from the language of the provision itself, as well as from its association with or inclusion in the same paragraph and at the same rate with other articles composed of the same materials, embroidered by hand or machinery. There could be no good reason for imposing the higher rate on embroidered handkerchiefs with a plain hem, or not hemmed at all, while admitting embroidered handkerchiefs when hemstitched, imitation hemstitched, or scalloped, at the lower rate; and it cannot be assumed that congress would perpetrate an absurdity or work an incongruity. The term 'embroidered handkerchiefs' (paragraph 276) is descriptive, and not a commercial or trade designation. It is therefore immaterial whether the handkerchiefs in question are or are not known commercially as 'embroidered and hemstitched handkerchiefs,' or 'embroidered and scalloped handkerchiefs.'"

The decree below is affirmed.

FIELD et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. November 22, 1898.)

No. 504.

1. CUSTOMS DUTIES—CONSTRUCTION OF LAW—COMMERCIAL DESIGNATION.

To constitute a commercial or trade designation, as contradistinguished from a descriptive term, the words, it would seem, must be used in commerce in an unvarying or stereotyped order.¹

2. SAME—CLASSIFICATION—EMBROIDERED HANDKERCHIEFS.

Embroidered handkerchiefs, although both hemstitched and embroidered, are dutiable under paragraph 276 of the tariff law of 1894, as "embroidered handkerchiefs"; such words being descriptive, and not a trade-name.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This is an appeal from a decree of the circuit court affirming a decision of the board of general appraisers as to the classification of certain imported merchandise.

J. M. Barnes, for appellants.

John C. Black, for the United States.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The question here, as in the case of Carson v. Nixon, 90 Fed. 409, is whether, under the act of August 28, 1894, certain imported handkerchiefs, which were both hemstitched and embroidered, were dutiable at 50 per cent. ad valorem, according to paragraph 276, as "embroidered handkerchiefs," or 40 per cent. ad valorem, according to paragraph 258, as "handkerchiefs not specially provided for in this act." The testimony in this record was given in the main by other witnesses than those examined in the case of Carson v. Nixon, *supra*, and in important particulars is not the same as in that

¹ As to use of commercial and trade terms in tariff laws, see note to Dennison Mfg. Co. v. U. S., 18 C. C. A. 545.

case; but it was conceded at the argument that the cases were heard together by the board of general appraisers, and that the testimony in both cases was considered by that board in determining each. After the appeals to the circuit court had been docketed, additional and distinct testimony was taken in each case; and it is now contended in behalf of the appellants that this appeal must be determined upon the record before us, without reference to the testimony in the other case. In view of the admission that there was evidence before the board of general appraisers which is not presented, it is not clear that the appeal ought not to be dismissed on that ground, especially since there is no certificate of evidence in the record, and the certificate of the clerk is simply that the transcript "is a true and complete transcript of the record of the proceedings had" in the circuit court; but, passing that question, we are of opinion that on the evidence before us the decree below should be affirmed.

The question for decision is whether the words "embroidered handkerchiefs," as used in paragraph 276 of the act of 1894, are descriptive, or constitute a trade-name, according to the rule defined by the supreme court in *Maddock v. Magone*, 152 U. S. 368, 14 Sup. Ct. 588, and quoted in *Carson v. Nixon*, *supra*. There is in this record much testimony to the effect that a handkerchief which is hemmed only is known commercially and is invoiced as a "hemmed handkerchief," one which is hemstitched only as a "hemstitched handkerchief," and one which is both hemstitched and embroidered as a "hemstitched and embroidered handkerchief"; though in respect to the last the witnesses have used the words interchangeably, and evidently in a descriptive sense, sometimes saying "hemstitched and embroidered," and sometimes "embroidered and hemstitched." To constitute a name or designation, as contradistinguished from description, the words, it would seem, should be used in an unvarying or stereotyped order. No witness has professed to know or has testified that there is a particular make of handkerchiefs, which generally throughout the United States is known commercially as an "embroidered handkerchief," which does not include embroidered handkerchiefs which are also hemmed or hemstitched or scalloped. Indeed, the contention in this case is that the "embroidered handkerchief" is scalloped, and not one which is hemmed, as was contended and testified in *Carson v. Nixon*. While we are not to import the testimony of that case into this, yet, with the knowledge of it fresh in mind, we are justified in looking critically into the testimony presented, and in refusing to regard it as establishing inferentially something which is not directly stated, and which, if stated, would be inconsistent with the proof made in the other case.

It may be conceded, as asserted, that "in the testimony taken at New York nearly every witness stated that handkerchiefs invoiced as embroidered or scalloped never included those which were both hemstitched and embroidered." That was true by the conjunctive force of the latter words, without regard to the question whether they constituted a trade-name. It was so declared by the courts in a number of cases. *Rice v. U. S.*, 10 U. S. App. 670, 4 C. C. A. 104, 53 Fed. 910; *U. S. v. Gribbon*, 14 U. S. App. 382, 5 C. C. A. 287,

55 Fed. 874; *Wilson v. U. S.*, 9 U. S. App. 674, 6 C. C. A. 310, 57 Fed. 199. But the further assertion that "several witnesses stated that the word 'embroidered' was a trade-name" is not fully borne out by the portions of the record to which reference has been made. To the question, "Is there any difference between what is commercially known as a 'hemstitched and embroidered handkerchief' and what is known as an 'embroidered handkerchief'?" the witness answered, "Yes, sir; an embroidered handkerchief is a separate and distinct kind of handkerchief, as shown by the testimony of the principal importers at New York, as stated in the decision." It will be observed that in the second clause of the question the words "what is known" are repeated, but the word "commercially," found in the first clause, is omitted; and the answer, therefore, if given intelligently and discriminatingly, attributes no commercial significance to the words "an embroidered handkerchief." To the question whether handkerchiefs specified in an entry as "initials hemstitched and embroidered handkerchiefs scalloped embroidered linen" (without punctuation) were known in trade and commerce by the designations so written, a witness answered, "Yes;" and to the further question whether articles "specified as embroidered and scalloped handkerchiefs are those known as embroidered and hemstitched," he answered, "No." Another witness testified that, upon an order for "an embroidered handkerchief," he would send a scalloped handkerchief like the sample shown him, which he said was "simply a plain handkerchief embroidered at the edges," in the manufacture of which "there was no additional process." The only other witness whose testimony is cited on this point, referring to the same sample, said, "That is what we term an embroidered handkerchief," and would send in response to "an order for an embroidered handkerchief." The record shows, in the examination of another witness, the following questions and answers: "Do you import imitation hemstitched and embroidered handkerchiefs? A. We do. Q. How are they known in the trade? A. As 'embroidered handkerchiefs.' Q. As 'embroidered and hemstitched'? A. Yes, sir; I usually call them that." To help out the evidence adduced, which in itself is evidently insufficient, reference is made to the statement found in the opinion of the court in *U. S. v. Gribbon*, *supra*, that the "proofs also showed * * * that handkerchiefs which were embroidered only were likewise a standard article at that time"; and it is asked, "Ought not this finding to have great weight in the determination of the present question?" If it ought, then reference may also be made to the opinion of this court in *Carson v. Nixon*; and, on the conflicting evidence in the two cases, it is clear that the word "embroidered," as applied to handkerchiefs, has no settled significance as a trade-name. In Chicago it is a very cheap hemmed handkerchief, while in New York it is a scalloped handkerchief. The word must therefore have been used by congress in its ordinary, descriptive sense. The decree below is affirmed.

NORTON et al. v. JENSEN.

(Circuit Court of Appeals, Ninth Circuit. October 24, 1898.)

No. 421.

1. PATENTS—PRESUMPTION OF VALIDITY.

Where two patents apparently describe and claim the same art or article, the question of identity is open for examination, with the presumption in favor of their diversity.

2. SAME—RES JUDICATA—IDENTITY OF SUBJECT-MATTER.

A judgment in a suit for infringement of a patent does not render res judicata questions arising in a subsequent suit between the same parties for the infringement of the same patent by a machine for which a patent has been granted to the defendant since the former judgment was rendered, the subject-matter of the two suits not being identical.

3. SAME—CONSTRUCTION OF CLAIMS — ACQUIESCENCE IN REJECTION OF BROAD CLAIMS.

Where an applicant for a patent, after the rejection of his broad claims as the original inventor of a machine, acquiesces in such rejection, and amends and limits his claims to improvements merely, his action amounts to a disclaimer as to his broad claims, and a patent granted on such amended application is to be strictly construed, and confined to the improvements specified.

4. SAME—CAN-HEADING MACHINES.

Where amendments to an application for a patent for improvements in a can-heading machine, made to meet objections of the patent office, and on which a patent was finally granted, described for the first time an annular space created between the can-body and the mold, into which the flange of the can-head was forced in applying it to the body, such space became an essential element of the combination, and a device which omits such element is not an infringement.

5. SAME.

The Norton patent, No. 267,014, for improvements in a can-heading machine, on the facts disclosed by the file wrapper (which was not in evidence in Norton v. Jensen, 7 U. S. App. 103, 1 C. C. A. 452, and 49 Fed. 859), is not for a primary invention, and must be narrowly construed, and confined to the particular combination described. It is not infringed by a machine made under the Jensen patent, No. 443,445, for a new and improved machine for capping and crimping cans.

6. SAME.

Neither the Norton and Hodgson patent, No. 274,363, the Jordan patent, No. 322,060, both for improvements on the original Norton patent, No. 267,014, for improvements in can-heading machines, nor the Norton & Hodgson patent, No. 294,065, for a can-ending and seaming machine, is infringed by a machine made under the Jensen patent, No. 443,445, for a new and improved machine for capping and crimping cans.

Appeal from the Circuit Court of the United States for the District of Oregon.

This was a suit in equity by Edwin Norton and Oliver W. Norton, the appellants, against Mathias Jensen, the appellee, for the infringement of four letters patent, viz.: (1) The Norton patent, No. 267,014, dated November 7, 1882, as to claims 1 and 2; (2) the Norton and Hodgson patent, No. 274,363, dated March 20, 1883, as to claims 6 and 7; (3) the Norton and Hodgson patent, No. 294,065, dated February 26, 1884, as to claim 14; (4) the Jordan patent, No. 322,060, dated July 14, 1885, as to claims 1, 2, 6, 7, 11, 12, and 13. The patents, generally speaking, cover inventions for automatically putting the bottoms and heads on tin cans. The first of these patents (the Norton patent, No. 267,014) is upon what appellants claim to be the original invention of a machine for automatically applying tight, exterior fitting can-heads to can-bodies. The Norton and Hodgson patent, No. 274,363, and the Jordan patent, No. 322,060, are for improvements upon the Norton patent, No. 267,-

014. The Norton and Hodgson patent, No. 294,065, is for a combined can-heading and crimping machine. The purpose of the bill was to restrain the defendant, Mathias Jensen, from using a machine for can-ending and crimping purposes for which a patent was issued to him on December 23, 1890, numbered 443,445. This was the second patent issued to Mathias Jensen for a can-ending and crimping machine. His first patent was issued to him on January 24, 1888, is numbered 376,804, and was for "an improvement in can-crimpers and cappers." This first patent has been before this court, and, in a suit brought by these appellants against the appellee, Mathias Jensen, and one John Fox, and the patent was held to infringe the four patents now sued upon. See *Norton v. Jensen*, 7 U. S. App. 103, 1 C. C. A. 452, and 49 Fed. 859. It is strenuously contended by counsel for appellants that the rights asserted by them in that case and in the case at bar, and the matters of defense presented in both cases, are substantially the same, and that, therefore, the questions arising under the several patents of appellants now sued upon, with reference to the alleged infringement by the second Jensen machine, are res judicata between the parties. The claims of the four patents sued upon, alleged to have been infringed by Jensen's second machine, are as follows: Claims 1 and 2 of patent No. 267,014, issued November 7, 1882, to Edwin Norton, of Chicago, Ill., for "improvements in machines for putting on the ends of fruit and other cans": "(1) In a machine for applying to can-bodies heads fitting outside the same, the combination of a device for sizing the exterior diameter of the can-body to conform to the interior diameter of the can-head, and holding the same so sized while the head is applied, said sizing and holding device having its end enlarged to fit the exterior diameter of the can-head, so as to leave an annular space between it and the can-body for the reception of the flange of the can-head, with a device for forcing the can-head into said annular space, and thereby applying the head outside the can-body, substantially as specified. (2) In a machine for applying to can-bodies heads fitting outside the same, the combination of a chute or device for delivering the can-bodies to the machine, with a movable device for clamping the can-body and sizing its exterior diameter to conform to the interior diameter of the can-head, said clamping and sizing device having its end or mouth enlarged to leave an annular space between the same and the can-body clamped therein for the reception of the flange of the head, a chute or device for delivering the can-heads to the machine, and a device for forcing the can-head into said annular space at the end of said clamping and sizing device, substantially as specified." Claims 6 and 7 of patent No. 274,363, issued March 20, 1883, to Edwin Norton and John G. Hodgson, of Chicago, Ill., for an "improvement in can-ending machines": "(6) The combination of the can-body-clamping device or mold with a chute for the can-heads, a reciprocating head or piston at the base of said chute for automatically feeding the can-heads to the mouth of the mold and applying the same to the can-body, and a spring pin or device for holding the can-head in position at the mouth of the mold, substantially as specified. (7) The combination of the delivery-chute wheel having half-molds upon its periphery, reciprocating half-molds, chute for the can-heads, piston for applying the same to the can-bodies, and discharging chute, substantially as specified." Claim 14 of patent No. 294,065, issued February 26, 1884, to Edwin Norton and John G. Hodgson, of Chicago, Ill., for an "improvement in can-ending and seaming machines": "(14) The combination, with a can-body-clamping mold, of a chute or device for delivering the can-bodies thereto, a chute or device for delivering the can-heads at the mouth of said mold, mechanism for applying the can-head to the can-body, and a mechanism for binding and compressing into a seam the flanges uniting the can head and body, substantially as specified." Claims 1, 2, 6, 7, 11, 12, and 13 of patent No. 322,060, issued July 14, 1885, to Edmund Jordan, of Brooklyn, New York, assignor, by mesne assignments, to Edwin Norton and Oliver W. Norton, said patent being for an invention in "heading-machines for automatically applying the heads on the bodies of sheet-metal cans": "(1) In a can-heading machine, the combination, with two reciprocating part-molds, of a reciprocating device for conveying the can-body to a position between said part-molds, and holding it there while said molds move forward to clamp the can-body, substantially as specified. (2) The combination, with two part-molds, of a reciprocating device for con-

veying the can-body to a position between said part-molds and holding it there until clamped thereby, substantially as specified." "(6) The combination, with a pair of molds for clamping the can-body, of a plunger-head and a slide to adjust the can-head opposite the mold, substantially as specified. (7) The combination, with a pair of can-body-clamping molds, of a plunger-head, a reciprocating slide to move the can-head opposite the mold, and a chute for delivering the can-heads to said slide, substantially as specified." "(11) The combination, with a pair of can-body-clamping molds, of a chute for the can-heads, a slide for moving the can-head opposite said molds, and a lever and cam for operating said slide, substantially as specified. (12) The combination, with two part-molds, of a can-head chute, a slide to move the can-head opposite the mold, a lever and cam for operating said slide, a plunger and plunger-head, and a cam and lever for operating said plunger, substantially as specified. (13) The combination, with two part-molds, of a reciprocating conveyor to convey to and hold the can-body between said molds, and a cam and lever for reciprocating said conveyor, substantially as specified."

Patent No. 267,014, issued to Edwin Norton, November 7, 1882, is claimed, and was held to be, in the case of Norton v. Jensen, *supra*, an invention of a primary character. It was held that Norton's invention must be "considered as being of a primary character, standing at the head of the art as the first machine ever invented for applying tight, exterior fitting can-heads to can-bodies automatically." That patent was therefore held to be entitled to a broad and liberal construction. It appears affirmatively, however, that the file wrapper of patent No. 267,014 was not offered in evidence in the case of Norton v. Jensen, *supra*. But it was offered in evidence in the more recent case of Norton v. Wheaton, 44 U. S. App. 118, 17 C. C. A. 447, and 70 Fed. 833. In that case this court held that "the contents of the file wrapper, not in evidence in the case of Norton v. Jensen, 7 U. S. App. 103, 1 C. C. A. 452, and 49 Fed. 859, show that Norton, in his application for the patent, claimed to have invented, not an automatic or any other kind of machine for putting ends on fruit or other cans, but to have invented 'certain new and useful improvements in machines for putting on' such ends." This wrapper, which figures to such an important degree in the litigation affecting the validity of the various patents for automatically applying the heads on the bodies of sheet-metal cans, was introduced in evidence in the case at bar, and is as follows: "To All Whom It may Concern: Be it known that I, Edwin Norton, of Chicago, county of Cook, and state of Illinois, have invented certain new and useful improvements in machines for putting on the ends of fruit and other cans, of which the following is a specification: This invention relates to a machine for putting on the ends of fruit and other cans, wherein the joint by which the ends are secured to the body is of the variety commonly called the 'slip-joint,' in contradistinction from a seamed or turned joint. The objects sought are the performance of this operation automatically and with speed and efficiency. This invention consists in a clamping-mold, the interior dimensions and form whereof correspond with the exterior dimensions and form of the can-body, and the end whereof is chamfered away. In this invention the can-body is first placed within a clamping-mold conforming accurately in shape and dimensions to the exterior of the can-body, and while confined in this mold the end of the can is forced upon the body by a piston entering the mouth of the mold, room being provided for the entrance between the mold and can-body of the flange borne upon the end of the can by chamfering away the interior of the mold slightly as far as said flange extends. The mold is also preferably made tapering at the mouth, where the can end is received, so as to guide the end accurately to the body, and insure the registering of one with the other. In the furtherance of speed, I place a series of these molds, accompanied by pistons, upon arms radiating from and revolving around a common center, or upon a wheel, and at proper times actuate the molds to clamp and release the cans and the pistons to put on the ends by means of suitable devices with which they are connected or come in contact during the rotation of the arms or wheel."

Norton then proceeds to describe his invention very particularly, by a reference to the drawings. He then made the following claims for his inven-

tion: "(1) In a can-ending machine, the combination of a clamping-mold conforming to the exterior of a can-body, a piston for forcing the cap or end piece upon the body, and devices for operating said mold and piston, substantially as specified. (2) In a can-ending machine the combination of a clamping-mold conforming to the exterior of the can-body, and chamfered away at the end so as to give room for flange of the cap or end-piece, a piston for forcing the end-piece upon the body, and devices for operating both mold and piston, substantially as specified. (3) In a can-ending machine, the combination of clamping-mold, conforming to the exterior of the can-body, a chute for admitting the can-ends, a piston for applying the ends to the body, and devices for operating both mold and piston, substantially as specified. (4) In a can-ending machine, the combination of a series of clamping-molds, mounted and rotating about the common center, devices for opening and closing said molds, a piston or pistons for each mold, and a device or devices for operating said pistons, substantially as specified. (5) The combination with a movable can-clamping and discharging mold, of a device for forcing the can-end upon the can-body while clamped in said mold, substantially as specified. (6) The combination with a clamping-mold for the can-body, of a chute or device for delivering the can-bodies to said mold, a device for presenting and retaining the can-end in position at the mouth of the mold, and means for forcing the can-end upon the can-body, substantially as specified."

The patent office, after due examination, rejected all of these claims, and assigned the following reasons: "Claims 1, 2, and 5 are rejected on each of the following: Pierce, December 21, 1880, No. 235,700, soldering machines. Dillon & Cleary, October 12, 1880, No. 233,079, and Brooks, March 23, 1880, No. 225,685, die seaming, and English patent, A. D. 1873, No. 4,237. Claims 3 and 6 are rejected on Pierce, and, since the chute which he shows may be applied to any one of the other references, the claims are rejected on all the other references, taken in connection with Pierce. Claim 4 is rejected on Pierce and on the English patent, each showing a series of clamps, and a stationary piston for inserting the head into each mold and its contained can as it comes opposite the piston. In view of the broad description, including various modifications of applicant's machine, these patents meet the fourth claim."

Norton thereupon amended his application by inserting after the word "efficiency," in his original application, the following: "Heretofore machines have been constructed for applying the heads to that class of cans where the flange of the head is inserted inside the can-body, or where the head is crimped on the can-body. In such machines the interior of the can-body is ordinarily sized so as to fit and receive within it the can-head by means of an interior mandrel or former, which is forced inside the can-body while it is secured within a mold or holder, and then the can-head is dropped or pressed into place inside the can-body, as illustrated in letters patent No. 235,700, granted to George H. Pierce December 21, 1880. As the can-bodies are originally formed around an inside mandrel, the interior diameter of the can varies, if at all, very slightly, and the side seam also ordinarily forms no projection on the inside of the can, as it does on the outside; so that the operation of applying the heads to this class of cans would be comparatively simple and easy, even if the heads were required to fit the can-bodies tightly, which, however, is not the case. But heretofore no successful method has yet been devised for automatically applying heads or covers to that class of cans wherein the flange of the cover slips or fits over the body of the can, forming the ordinary slip-joint. In that class of cans it is essential that the heads or covers, when snapped on the can-body, should fit the same very tightly and accurately; and as the exterior diameters of the can-bodies always vary somewhat, owing to the varying thickness of the different parts of the stock from which they are made, the operation of snapping or fitting the heads on the can-bodies is one of considerable difficulty, and when done by hand, as it heretofore always has been done, it requires skilled labor, and is a slow and tedious operation. The heads or covers for the cans are formed by a stamp, so that their interior diameters are always precisely the same, and in my machine the can-bodies are placed within a can-sizing and clamping mold, and compressed thereby until the exterior diameter of the can-

body is made to conform accurately to the interior diameter of the head, and so held while the head is forced upon the can-body, the mold or holder being cut away or enlarged at each end to conform to the exterior diameter of the head, thus leaving an annular space between the can-body and mold conforming to the thickness and width of the flange on the can-head or end, into which annular space the head is forced, and then the mold is opened and the headed can discharged."

In lieu of the six claims made by his original application, which were rejected, as stated, by the patent office, Norton substituted four other claims as amendments. The fourth claim was again rejected by the patent office, but the first three were allowed; and, as thus allowed, a patent was issued to Norton. The third claim is not involved in this case; the first two are, and have already been set out. In a note appended by Norton to the amendments made to his original application, he thus further explained the character and scope of his invention: "The principle and mode of operation of the present invention is entirely different from that of the machine shown in the references, and is designed to effect a very different result or purpose. The references all show devices for putting the heads inside of the cans. Instead of the inside mandrel shown in the Pierce patents for sizing and flaring the interior of the can, in applicant's invention no such method of operation is, or could be, adopted. In applicant's invention the can is sized from the outside. None of the references show a mold or clamp for the can-body having an annular space between the can-body and mold, into which the head is forced, nor do any of the references show sizing the exterior of the can from the outside, both of which are essential features of applicant's invention. By the amended claims, as well as by the amendment to the specification, it will be seen, we think, that applicant's invention is properly limited and distinguished from the prior art, as disclosed by the references."

Two facts of vital importance in this case appear from the wrapper, viz.: First, Norton, in his original and amended specification, never took the position of being an original inventor, but, on the contrary, simply claimed to be an improver. He claims to have invented certain new and useful "improvements in machines for putting on the ends of fruit and other cans"; second, when the patent office rejected all of his claims in the original application on the ground that they were anticipated by other inventions, Norton failed to contest, or enter any protest to, this ruling of the patent office, but amended and limited his claims so as to conform to the ruling.

In the specification forming part of letters patent No. 443,445, which covers Jensen's second machine, he states that he has "invented a new and improved machine for capping and crimping cans"; that "the invention consists in an improved mode of applying the same principle as adopted in my prior invention, shown and described in United States letters patent No. 376,804, granted to me January 24, 1888"; that "the object of the invention is to increase capacity and insure certainty, especially in capping and crimping cans after the same are filled, without spilling the contents." After minutely describing his invention with reference to the drawings accompanying the same, and the mode of operation, Jensen made the following claims: "(1) In a machine for capping and crimping cans, a heading device provided with two semicircular plates, each plate having one-half conical guide at each end, and adapted to close on either one of two sides alternately, and thereby form an entire cone-guide or tapered hole on one side, while opening and separating on the other side, substantially as shown and described. (2) In a machine for capping and crimping cans, the combination, with a recessed table having two fixed, conical guiding-holes opposite each other, of two semicircular plates fitted in the said recess, adapted to close and form an entire conical guiding-hole on either one of two sides alternately, and, in conjunction with either one of said fixed, conical guiding-holes, two passages adapted to receive and guide the can-caps, one at a time, over said entire cone-guide when closed on either side, and means to move and stop the can-heads, one at a time, in said passage, while the ends of the can-bodies, one at a time, are guided through said entire cone-guide into the can-head, and a headed can released at the opposite side, substantially as shown and described. (3) In a machine for capping and crimping cans, the combination, with a table having two tapered guiding-holes fixed opposite each other, of two semicircular

plates fitted into said table, and adapted to close at either one of two sides and form an entire tapered guiding-hole in conjunction with either one of said fixed holes, stop-pins on the said table through slots in the said plates to insure the said conjunction, and means to move and stop the can-heads, one at a time, over the small end of said entire guiding-hole when closed on either side, and while the end of a can-body is forced through said hole into the can-head, and a headed can removed at the opposite side alternately, substantially as shown and described. (4) In a machine for capping and crimping cans, the combination, with a revoluble can-heading device provided with flanges to push the can-caps forward with the revolution of said heading device, of a fixed plate or device adapted to guide the can-caps, one at a time, into said heading device, and hold it while the end of a can-body is forced into it, with means to actuate the same, substantially as shown and described. (5) In a machine for capping and crimping cans, the combination, with a revoluble disk horizontally arranged, and provided with an even surface to carry the can-heads on, of a fixed guideway adapted to guide the can-heads while carried on said even surface, a stop to stop the can-caps while said even surface slides under the same, and means to move the can-caps, one at a time, from said disk into a heading device, substantially as shown and described. (6) In a machine for capping and crimping cans, the combination, with a revoluble disk horizontally arranged, and provided with a smooth and even surface to carry the can-bodies on, of a fixed guideway adapted to guide the can-bodies while carried on the said smooth surface, a stop over said smooth surface to stop the can-bodies while said disk revolves, and means to move the can-bodies, one at a time, from said stop into a can-heading device, substantially as shown and described. (7) In a machine for capping and crimping cans, the combination, with a revoluble disk horizontally arranged, and provided with a smooth and even surface to carry the can-bodies on, of a fixed guideway to guide the can-bodies while carried on said smooth surface, a stop over said smooth surface to stop the can-bodies while said disk revolves, with means to move the can-bodies, one at a time, from said stop into a heading device, and again remove the headed cans from the same to a crimping device, substantially as shown and described. (8) In a machine for capping and crimping cans, a crimping device mounted on a frame comprising a revoluble disk mounted in and flush with a table fixed in said frame, an arm pivoted in fixed bearings under said table, having a plate cushioned in the end thereof, and adapted to raise and lower the said disk, a second disk mounted and rotated in fixed bearings above the said table, adapted to receive and revolve the can when raised on the said first disk, a third revoluble disk journaled in an arm pivoted in a fixed support on the said table, and means to automatically place the cans, one at a time, between said first and second disks, and revolve the same while the periphery of said third disk is applied against the flange of the can-head, with means to release and discharge the crimped can, substantially as shown and described. (9) In a machine for capping and crimping cans, the combination, with a horizontally-arranged disk rotated in fixed bearings, and flush with a table having a smooth surface adapted to carry the cans in an upright position, of a stoppage across said smooth surface to stop the cans while said disk revolves under, a swinging arm or device adapted to move the can-bodies from said stoppage to and from a crimping device, so that one follows another in succession, and means to actuate the same, substantially as shown and described."

Upon the evidence adduced in the case, and in view of the prior decisions of this court, as contained in *Norton v. Jensen*, supra, and limited by the subsequent decision of *Wheaton v. Norton*, supra, the learned judge of the court below held that the Norton patent, No. 267,014, should be strictly construed, and, being so construed, that the invention and patent of Jensen to his second machine did not infringe the appellants' invention and patent. It was also held that the Jensen machine did not infringe any of the other inventions and patents sued on in this case. The bill was therefore dismissed, and the present appeal is brought to review that decision.

John H. Miller and Munday, Evarts & Adcock, for appellants.
John T. Lighter, for appellee.

Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

MORROW, Circuit Judge, delivered the opinion of the court.

The first question to be determined is whether the matters and things in controversy in the present suit are *res judicata* by reason of the judgment in the case of *Norton v. Jensen*, 7 U. S. App. 103, 1 C. C. A. 452, and 49 Fed. 859. The parties in both suits are the same. Edwin Norton and Oliver W. Norton were the complainants in the case referred to, while Mathias Jensen and one John Fox were the defendants. John Fox is not a party to the case at bar, it appearing that he is now dead. His absence from the case may be treated as immaterial. It is also true that the claims of the four patents involved in this case were sued on in the case referred to, and there held to be valid as against Jensen's first machine. But here the identity between the two cases ceases. A different patent of Jensen's is now involved. It is not the same patent involved in the previous suit, but a second patent, which the patent office deemed proper to allow him. The presumption is that Jensen invented something new, or he would not have secured this second patent. Where two patents apparently describe and claim the same art or article, the question of identity is open for examination, with the presumption in favor of their diversity. Rob. Pat. § 896. At any rate, the defendant is not to be barred from presenting a full defense upon the merits by the application of the doctrine of *res judicata* with reference to another patent. While we appreciate fully that the doctrine of *res judicata* is a salutary one, intended to mitigate the evils which follow prolonged and repeated litigation, still the decisions show that the courts have always restricted its application to cases where, among other identities, the subject-matter was the same in both cases. *Cromwell v. Sac Co.*, 94 U. S. 351; *Russell v. Place*, Id. 606; *Lumber Co. v. Buchtel*, 101 U. S. 638; *Wilson's Ex'r v. Deen*, 121 U. S. 525, 7 Sup. Ct. 1004; *Bissell v. Spring Valley Tp.*, 124 U. S. 231, 8 Sup. Ct. 495. The case at bar differs from the prior case of *Norton v. Jensen*, in that a different patent is now involved. There is *prima facie* a lack of identity in the subject-matter of the two cases, and therefore upon the face of the record there is no estoppel either in judgment or in evidence. As was well said by Mr. Justice Field in the case of *Russell v. Place*, *supra*:

"According to Coke, an estoppel must 'be certain to every intent'; and if, upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence." Citing *Alken v. Peck*, 22 Vt. 260, and *Hooker v. Hubbard*, 102 Mass. 245.

Whether the defendant has infringed the complainant's four patents, in favor of which judgment was rendered in the former case, depends upon the evidence adduced in this case. That question obviously cannot be determined by the evidence presented in the other case. The defendant's machine, involved in this case, purports to be a different machine from the one enjoined in the former case. Defendant contends that it is entirely different, and does not infringe the complainant's four patents declared valid as against Jensen's first

machine in the former case. On the other hand, the complainants contend that the changes, such as they are, existing between Jensen's first and second machines, are slight and immaterial. Which of these contentions is true can only be determined by the evidence adduced in the present case, and not by the evidence introduced in the former case.

This brings us to the second question on this appeal, which involves a consideration of the evidence presented in the case, as to whether Jensen's second machine, covered by patent No. 443,445, does infringe appellant's machines covered by the four patents sued upon. Preliminarily, however, it must first be determined what construction the claims of Norton's alleged original patent, No. 267,014, are entitled to, —whether to the broad and liberal construction given to them by this court in *Norton v. Jensen*, or to the strict construction held to be applicable by this court in the subsequent decision rendered in *Wheaton v. Norton*. The introduction of the file wrapper in the present case effectually disposes of this question. As heretofore stated, the file wrapper was not introduced in evidence in the former case of *Norton v. Jensen*, but it was introduced in the subsequent case of *Wheaton v. Norton*. This file wrapper, the most material parts of which have been set out in the statement of the case, shows that the original claims made by Norton for his invention were disallowed and rejected by the patent office, and that he thereupon amended and limited his claims so as to conform to the determination of the patent officials. The record of the proceedings before the patent office, as disclosed by the file wrapper, shows that Norton, upon the rejection of his claims, substantially abandoned the position of being an original inventor of a machine designed for automatically applying tight, exterior fitting can-heads on can-bodies, and so amended and limited his claims as to take the unequivocal and unmistakable position of an improver. The difference between the two, in the construction of patents, is very marked, and places an entirely different aspect on the case. An original inventor, a pioneer in the art, he who evolves the original idea and brings it to some successful, useful, and tangible result, is, by the law of patents, entitled to a broad and liberal construction of his claims; whereas an improver is only entitled, and justly so, to what he claims, and nothing more. Furthermore, an application for a patent which has been rejected, and is subsequently amended to conform to the objections of the patent office, is strictly construed. In *Sargent v. Lock Co.*, 114 U. S. 63, 5 Sup. Ct. 1021, a patent was granted to an inventor for improvements in time locks, after applications for patents had been repeatedly rejected. In declaring the rule by which the claims of the patent should be construed, the supreme court, through Mr. Justice Blatchford, said:

"Limitations and provisos imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor, and in favor of the public, and looked upon as in the nature of disclaimers."

See, also, *Water-Meter Co. v. Desper*, 101 U. S. 332; *Gage v. Herring*, 107 U. S. 640, 2 Sup. Ct. 819; *Fay v. Cordesman*, 109 U. S. 408, 420, 3 Sup. Ct. 236.

In *McCormick v. Talcott*, 20 How. 402, 405, the inquiry was whether McCormick was the first person who invented, in a reaping machine, the apparatus called a "divider," performing the required functions, or whether he had merely improved an existing apparatus by a combination of mechanical devices which performed the same functions in a better manner. The court, speaking through Mr. Justice Grier, said:

"If he [the patentee] be the original inventor of the device or machine called the 'divider,' he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a known machine, by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination, performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first."

In *Railway Co. v. Sayles*, 97 U. S. 554, 556, the supreme court, speaking through Mr. Justice Bradley, said, in regard to brakes for eight-wheeled railroad cars:

"Like almost all other inventions, that of double brakes came when, in the progress of mechanical improvement, it was needed; and, being sought by many minds, it is not wonderful that it was developed in different and independent forms, all original, and yet all bearing a somewhat general resemblance to each other. In such cases, if one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute. But if the advance towards the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs."

In view of the evidence presented in the case at bar, we think the decision of this court in the case of *Wheaton v. Norton*, supra, stated the correct rule of interpretation and construction which should be given to Norton's original patent, No. 267,014. We now consider the machines invented by the contesting parties, their construction, and respective mode of operation:

In *Wheaton v. Norton*, 44 U. S. App. 118, 17 C. C. A. 447, and 70 Fed. 833, Circuit Judge Ross, rendering the opinion of this court in that case, clearly and succinctly states the general process of can manufacture as it relates to the mechanism for placing can-heads on cans, particularly with reference to the invention of Norton, which was involved in that case as well as in the case at bar. The learned judge uses the following language:

"In sheet-metal can manufacture, where the heads are applied to the outside of the body, the heads are struck from circular sheets of metal by means of dies, one of which is a plunger of the shape and size of the inner diameter of the can-head flange, and the other of which is a matrix or raised die of the depth of the flange and of the diameter of the exterior of the flange. The circular disk of sheet metal being laid on this matrix, and the plunger depressed to force the sheet into it, the result is that the flange is upturned around the margin of the sheet-metal disk, and is of definite dimensions, both as to its thickness and as to its exterior and interior diameter. Can-heads made by the same dies are therefore always of the same size. Can-bodies

are, however, not always of the same size, whether they be made by hand or by machinery. They are formed over a horn or mandrel, which at best can only give them uniform interior diameter, even if it were possible to press the blank sheets around the mandrel with uniform force, or to make the joint forming the side seam with uniform accuracy. Besides this, the can-bodies thus made are liable to vary in both internal and external diameter. They are also subject to variation in external diameter, even if of uniform size inside, because of the varying thickness of the sheet metal of which they are made; such variation sometimes occurring in the same sheet, and in different parts of the form of the can-body. As it is necessary that the can-heads, which are of uniform diameter, shall in all cases closely fit against the exterior surface of the end of the can-body, it is therefore requisite that an external compressing means shall be employed to compress or reduce can-bodies which are slightly too large for the proper size to enter the can-head. This externally applied compressive force must be in action at the time the can-head is applied to the can-body, because the relaxation of such force would allow the can-body to expand to its original size, and to assume any irregularity of shape which it previously possessed, and thus unfit it to receive the head. Therefore the compressive force applied to the can-body must continue to hold the can to its form and size while the head is being put thereon. As the head is to closely fit the exterior of the can-body, and the two are to be applied simultaneously to each other at all points in their circumference, it is essential that both the head and the body be held in exact alignment with each other while the two parts are being brought together. It is therefore essential that whatever device be constructed to carry into effect this purpose must be so constructed as—First, to bring the ends of the can-body to the necessary size and diameter to receive the can-head; secondly, the head and body must be accurately held in proper alignment, so that, in the act of bringing them together, the flange of the head may closely fit the outside of the body; thirdly, there must be a direct and uniform movement of either the can-head or can-body simultaneously at all points in the circumference upon the can-body, and to carry forward the operation of heading to its completion; and, fourthly, the means for sizing the can and for shaping it to a perfect circle and size must be external to the can, and so adapted as to open to release the can after the heads shall have been applied."

With reference to the nature of Norton's so-claimed original patent, No. 267,014, Judge Ross, in the same opinion, said:

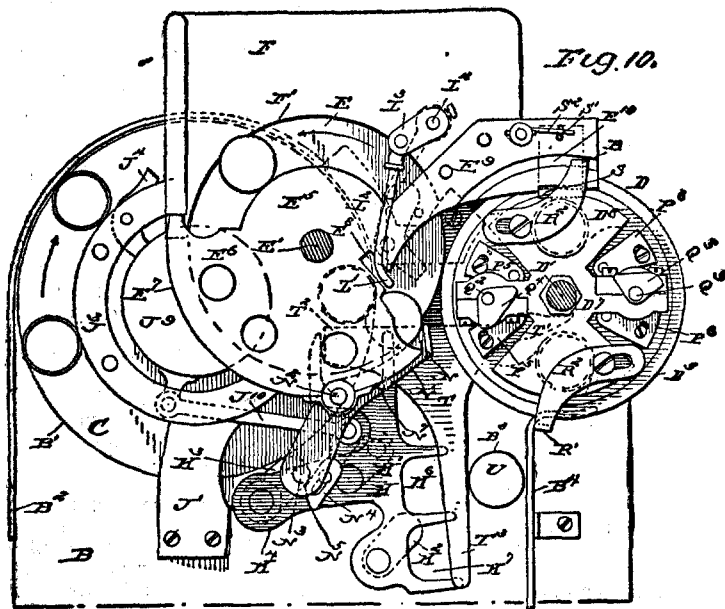
"Comparing the original with the amended claims of Norton, it is not difficult to see the difference between what he sought to have allowed him, and what he was compelled to accept in order to get his patent. Take claim 1. As originally made, it read: 'In a can-ending machine, the combination of a clamping-mold conforming to the exterior of the can-body, a piston for forcing the cap or end-piece upon the body, and devices for operating said mold and piston, substantially as specified.' Here, as will be observed, nothing whatever is said about any annular space in the end of the mold, but the claim is simply for the combination of a clamping-mold conforming to the exterior of the can-body, and a piston for forcing the cap or end-piece upon the body, with the operating devices. As here made, claim 1 was clearly anticipated, as held by the patent office, by the patent of Pierce, the device of which consisted in part of an opening and closing mold or clamp, the upper end of which is chamfered away to enable the end of the can-body to be expanded after the reception of the can-head, which is forced to its place in the can by means of a piston while the can-body is tightly held by the mold. Claim 1, as thus originally made, was therefore rejected by the patent office, and the applicant substituted in lieu of it this claim, which was allowed: 'In a machine for applying to can-bodies heads fitting outside the same, the combination of a device for sizing the exterior diameter of the can-body to conform to the interior diameter of the can-head, and holding the same so sized while the head is applied, said sizing and holding device having its end enlarged to fit the exterior diameter of the can-head, so as to leave an annular space between it and the can-body for the reception of the flange of the can-head, with a device for forcing the can-head into said annular space, and thereby applying the head outside the can-body, substantially

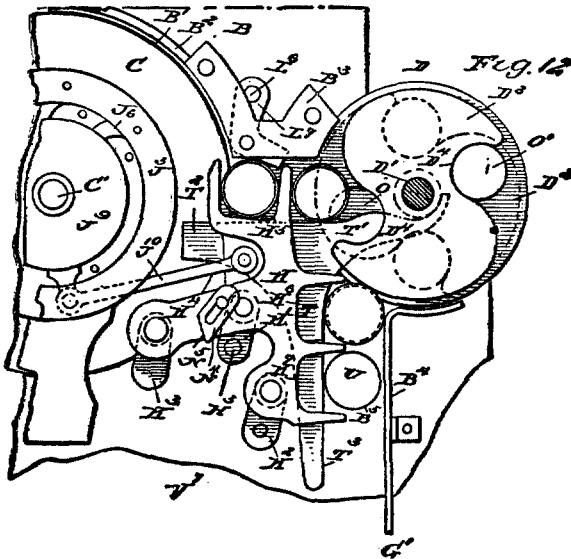
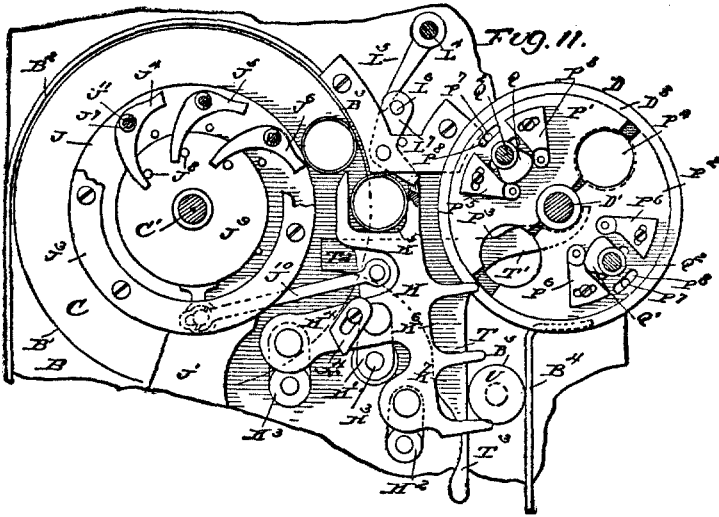
as specified.' Now, here, is an element inserted in claim 1 by the applicant which the original claim did not contain, namely, a mold so constructed as to leave at its end an annular space between the mold and can-body for the reception of the flange of the can-head, with a device for forcing the can-head into the annular space, and thereby applying the head outside the can-body. That the annular space so introduced is an important and essential element of Norton's invention was expressly declared by himself in the note to his amended specifications and claims, where he said: 'None of the references [that is to say, none of the patents to which his attention had been called by the patent office] show a mold or clamp for the can-body having an annular space between the can-body and the mold, into which the head is forced, nor do any of the references show sizing the exterior of the can from the outside, both of which are essential features of applicant's invention.' And in his specifications the applicant also expressly asserted the essential nature of the annular space of the mold, for he there says: 'As shown in Figs. 2 and 3, the end of the mold is chamfered away interiorly to give room to the flange of the cap or can-end to pass outside the can-body. This is a very essential feature. * * *' Thus, the inventor himself, when seeking the patent, declared that one of the essential elements of his invention is the annular space between the can-body and mold into which the can-head is forced, thereby, as in terms declared in claim 1, applying the head to the outside of the can, in which respect, the inventor further declared, his invention differs from any of the patents to which he was referred by the patent office. Another essential element common to all of the complainants' claims, as finally made, allowed, and embodied in their patent, is the piston, or device for forcing the can-head into the annular space. * * * Claim 2 of the complainants' patent, in addition to the elements in claim 1 thereof, embraces a chute or device for delivering the can-bodies, and a chute or device for delivering the can-heads to the machine, and claim 3 is 'for simultaneously applying the heads to both ends of a can, the combination of a series of movable devices,' such as is claimed in claim 1, to wit, the mold for clamping the can-body and sizing its exterior diameter to conform to the interior diameter of the can-heads, with an annular space at its ends for the reception of the flange of the can-heads, with devices for simultaneously forcing the can-heads into the annular space, and on each end of the can-body. An annular space is a space existing between the circumferences of two concentric circles having different diameters. It exists in the mold of complainants' device, with its two diameters, the smaller of which is equal to the diameter of the exterior of the can-body and to that of the interior of the flange of the can-head, and the larger of which is equal to the diameter of the exterior of the can-head flange. The function of the smaller diameter of the complainants' mold is to size and round the can-body by external pressure, and that of its larger diameter, constituting the annular space, is the reception and guiding, in line with and upon the can-body, of the flange of the can-head when forced therein by the piston; thus tightly applying, with precision and at the same time, all of the parts of the interior of the flange of the can-head to the outside of the can-body, while the latter is, during all of the time of the heading process, firmly held by the mold in an immovable position. In the complainants' device, two wheels are employed to rotate on a common, stationary axis, and to carry at their peripheries molds in a circumferential series. Each of these molds consists of a fixed inner semi-circular jaw and two quarter-circular jaws, the latter being hinged to the former, and adapted to open and close the mold like the two halves of a double-lidded vessel, wherein the half lids open outwardly. Means are provided for opening and closing these hinged parts of the mold, consisting of crank arms or levers, a slide connected by links with the lever, and a fixed cam provided with a groove or grooves which receive a pin that projects laterally from the slide, and causes the slide to move radially inwardly and outwardly as the wheels revolve. At one point in the revolution of the wheels, and at a point where the hinged parts of a mold will open, a chute for can-bodies is arranged to deliver a can-body into the mold. The mold for receiving the can-body is closed in its further revolution by the fixed cam. To each mold are also applied two end chutes down which can-heads may descend into proper position opposite the ends of the can-body inclosed in the mold. Two piston heads on pistons

or shanks are arranged to move inwardly towards the mold, one from each side, and to simultaneously push the can-heads into the annular spaces, and thus upon the ends of the can-body. The desired movements of these pistons are obtained by springs and cams; springs being arranged to throw and hold the pistons in their retracted positions, and cams being employed to thrust the pistons inward in forcing the can-heads into the annular spaces and thereby upon the can-bodies. The mold is made in two parts, so as to open and receive the can-body, and to discharge it after it is headed. In his specifications the inventor said: 'A model constructed after my invention (that is, so as to conform to the exterior of the can-body) fits the body accurately, and presses with equal clamping force upon every part thereof.' When closed upon the can-body, the mold holds it in an immovable position, the can-head being carried from the can-head chute by means of the piston or forcing device into the annular space of the mold, and thereby applied to the outside of the can-body. After the pistons have passed the can they are retracted by the springs, and the mold is opened by the fixed cam so as to discharge the headed can from the mold."

The nature of the operation of Jensen's second machine, reference being had to the drawings, is as follows:

"When the machine is set in motion, the filled can-bodies are passed, one or more at a time, over the table, B, onto the revolving disk, C, between the arms, J¹, of the fixed disk, J, and the guide-rail, B². The caps of the cans are passed with their flanges downward over the table, F, onto the disks, E, to be carried along by the latter until they strike against the stop-pins, L¹ and N. The can-bodies on the disk, C, move forward until temporarily interrupted in their forward movement by the levers, J⁴, J⁵, and J⁶, which serve to insure proper meeting of the can-bodies with the fork, K⁶, of the arm, K, which moves the can-body from the disk, C, across the table, B, against the lever, L⁷, so that the releasing device, L, is actuated, and at about the same time the lever, N¹, is operated on by the cam, N⁴, so that the cap held by the stops, L¹ and N, is freed and moves forward at the time the can-body moves onto the table, D², over the respective plungers, O or O¹. The flange, R or R¹, then overtakes the cap and pushes it forward





while the plate, E^0 , is guiding it into, and against the end of the passage, D^0 , over the conical guiding-hole, P , so that it is just in time to receive the upper end of the can-body, which is pushed upward through the guiding-hole, P , into the cap by the plunger, O or O^1 . When the can-body has fairly entered the cap, the plates, P^1 and P^2 , are actuated to close and lock the opposite side for a succeeding can to be capped in the same manner, and this also separates the plates, P^1 and P^2 , from the capped can, which is then lowered on the plunger, O or O^1 , while a succeeding can-body is forced up into a cap in the opposite side of the heading-device, D , the same as the first, and when the capped can is sufficiently lowered then it is against the curved arm, T^1 , by which it is guided out of the heading device. The fork, K^e , of the arm, K , now takes hold of the capped can, and moves it forward be-

tween the arms, T, and the guide-rail, B⁴, over the disk, U, which then rises at the receding of the fork, K⁶, and presses the cap of the can into the recessed disk, G², so that the can and the disk, U, revolve with the said disk, G², and then the crimping-disk, V, is moved against the flange of the cap and presses the same inward, thus crimping the cap securely onto the upper end of the can-body. When this is accomplished, the crimping-disk, V, is disconnected from the cap of the can, and the latter descends with the downward-sliding disk, U, until said disk is seated in its seat, B⁵, in the table, B. The fork, K⁷, of the arm, K, now engages the can and moves it forward in the guideway to about the center of the disk, V, and at the next movement of the arm, K, the outer prong of the fork, K⁷, touches the rear side of the can and again moves it forward in the guideway. The next can following is moved against the first can, so that the latter slides up the incline, W¹, and moves with its side against the arm, W, so that the can is tipped over and falls onto the rails, W², and the continuation of the rail, B⁴, to roll off to the soldering machine. It is understood that were the disks, C and E, continuously supplied with caps and cans, then the mechanisms for regulating the can-bodies and releasing the can-heads would not be necessary, as the fork, K⁶, can only move one can at a time from the disk, C, and the caps would readily be stopped on the disk, E, by a simple spring that would yield sufficiently to allow a can-head to pass when one of the flanges, R or R¹, strikes it. The spring would again retain its position to hold the next can-head until the other flange, R or R¹, strikes and moves it away like the first; but, considering its greater capacity, it cannot be fully supplied at all times by one man, unless he be unusually expert and careful. Hence the regulating mechanism is supplied, so that the can-bodies placed at random on the disk, C, may be properly entered into the heading device without being crushed, and the caps prevented from entering therein when there is no can-body to receive them."

It is contended by counsel for appellants that the new Jensen machine, whose operation and general nature have just been described, is substantially like the old Jensen machine, which in the previous case of *Norton v. Jensen*, supra, was held to be an infringement of the claims of the four patents sued on in this case. It is claimed that such differences which exist are slight and immaterial; that, to all intents and purposes, the new Jensen machine is similar, in construction, mode of operation, and result obtained, to the old Jensen machine. It will be necessary to compare, very briefly, the old and new Jensen machine, and then these machines with the Norton machines. In the previous case of *Norton v. Jensen*, it was held, among other things, that the old Jensen machine infringed Norton's invention, patent No. 267,014, in that it had the "annular space" peculiar to Norton's invention, and that the can-feeder in the old Jensen machine served as a substitute and equivalent to Norton's gravity chute. These conclusions were reached by giving to the Norton patent the benefit of the broad and liberal construction to which patents for original inventions, or, more properly speaking, for those of a primary character in the art, are entitled. It is very questionable whether such conclusion would have been reached had the two claims of the Norton patent been subjected to the strict construction applicable to patents for mere improvements. It is conceded in the opinion of the court in that case that the old Jensen machine contained improvements over the Norton machine. Looking at and comparing the old and new Jensen machines, we find that the new Jensen machine, as altered and changed from the old machine, does not contain any such a thing as an "annular space" in a sizing and heading device having its end

enlarged to fit the exterior diameter of the can-head, nor anything that reasonably approximates to it, nor does it possess the gravity chute peculiar to Norton's invention. It does contain a can-feeder, but that is not operated by gravity, nor does it contain the device for that purpose peculiar to the Norton chute. It is, on the contrary, a positive conveyor. The cans are placed on the revolving disk, and the mechanism carries the cans to the can-heading machine. The Norton chute can in no sense be regarded as an equivalent of the Jensen chute, any more than the latter could be regarded as a mechanical equivalent of the former. Nor does the Jensen machine contain the piston or device for forcing the can-head on the can-body, or either of their mechanical equivalents, whether contained in the original Norton machine, covered by patent No. 267,014, or in the improved machines, covered by patents No. 274,363 and No. 322,060. In the Jensen machine the can-body is moved towards the head, while in the Norton machine the can-head is moved towards the can-body. Further differences from a mechanical standpoint might be enumerated, but it is obvious that in a patent for a combination, which is what Norton claims, the alleged infringing machine must contain all of the elements of the combination, or their mechanical equivalents. *Prouty v. Ruggles*, 16 Pet. 337; *Stimpson v. Railroad Co.*, 10 How. 329; *Eames v. Godfrey*, 1 Wall. 78; *Seymour v. Osborne*, 11 Wall. 516; *Dunbar v. Myers*, 94 U. S. 187; *Fuller v. Yentzer*, Id. 298; *Merrill v. Yeomans*, Id. 568; *Water-Meter Co. v. Desper*, 101 U. S. 332; *Miller v. Brass Co.*, 104 U. S. 350; *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. 507. The new Jensen machine manifestly does not infringe, as it does not contain all the elements of the combination patent of Norton, or their mechanical equivalents. It does not contain the "annular space," nor the device which goes to make up the "annular space"; it does not contain the Norton gravity chute; it does not contain the tapering sizing mold as an equivalent of Norton's mold. Aside from these mechanical differences, it affirmatively appears that the new Jensen machine is superior to the Norton machine for heading hand-made cans, because the Jensen machine operates upon the extreme end of the can-body, which is to receive the can-head, and, by sizing and swedging the rim of metal, this part of the can-body is reduced to the size and dimensions to exactly enter the can-head, whereas the clamping-mold of the Norton machine operates only upon that part of the can-body which does not enter the can-head; and, while the effect is to size and mold the entire can-body, it is manifest that this mode of operation is entirely different from the other, and that it does not reach that degree of accuracy or efficiency in securing uniform, tight-fitting can-heads, obtained by the Jensen machine. The Jensen machine is also different in operation, and superior to the Norton machine, in applying heads to filled cans. This is explained by the fact that the can-bodies in the Jensen machine are held erect while the can-heads are placed thereon, whereas in the Norton machine the cans are somewhat tilted. It further appears that the Norton clamping-mold device, operating upon the circumference of the whole can-body, except the narrow rim which receives the can-head, compresses the can and slightly reduces its capacity. If,

then, the machine could be made to apply the head to an erect can, it would still be inferior to the Jensen machine, because the operation of the clamping-mold would have the tendency of causing the contents of the filled can to overflow, or to rise above the side of the can, thus soiling the joint between the can-head and can-body, and otherwise rendering the process imperfect. That the new Jensen machine is an improvement on the Norton machine, as covered by patent No. 267,014, is amply sustained by the evidence. This disposes of the Norton patent No. 267,014.

The remaining three patents may be briefly disposed of. Two of them (No. 274,363, dated March 20, 1883, granted to Norton and Hodgson, and No. 322,060, dated July 14, 1885, granted to Jordan) are for improvements on the original Norton patent, No. 267,014. The learned judge of the court below held that neither of these patents was infringed by the new Jensen machine. The evidence supports this view. This leaves patent No. 294,065, dated February 26, 1884, issued to Norton & Hodgson, for a can-ending and seaming machine. It is contended by counsel for appellants that this machine is of a primary character, and therefore the patent is entitled to a broad and liberal interpretation. But in the specification it only purports to be for "a new and useful improvement in can-ending and seaming machines." The object of the invention is to provide an automatic machine for applying the heads or ends to sheet-metal cans, and seaming the same. Furthermore, it appears to have been anticipated by the Miller patent, No. 232,535, which contains this combination. The New Jensen machine does not contain any of the material elements of the combination patents referred to. The differences between the appellants' machines and that of Jensen are material, and do not constitute infringement. It is unnecessary to go into detail in the evidence, nor to refer specifically to all of the mechanical differences in the construction and mode of operation of the machines sued on and the one alleged to infringe. That has been done very ably and clearly by the learned judge of the court below. The important feature of this case, as distinguished from the former case of *Norton v. Jensen*, is that the introduction of the file wrapper in this case shows beyond controversy that Norton claimed to be, and is, but an improver, and not an original inventor, of can-ending, crimping, and seaming machines. That being so, the construction to which the claims of his various patents are entitled is that of a strict construction, and not to the broad and liberal construction which the status of the case of *Norton v. Jensen* gave it. Both Norton and Jensen, being but improvers in the art of placing ends on cans, are entitled to just what they claim for their respective inventions, and nothing more. Applying this strict construction to the various patents sued on with respect to the one alleged to infringe, we are clearly of the opinion that the new Jensen machine does not infringe any of the four patents sued upon. The judgment of the court below is affirmed, and it is so ordered.

CITY OF CLEVELAND v. CHISHOLM et al.

(Circuit Court of Appeals, Sixth Circuit. November 14, 1898.)

No. 560.

1. APPEALS IN ADMIRALTY—REVIEW BY CIRCUIT COURT OF APPEALS

On an appeal in admiralty from the district court to the circuit court of appeals, the case is reviewable both upon the law and the facts.

2. SAME—REVIEW OF QUESTIONS OF FACT—WEIGHT GIVEN TO DECISION BELOW.

Though questions of fact are reviewable by the circuit court of appeals on appeals in admiralty, where the cause was tried before the judge, who saw and heard the witnesses, and the record contains the testimony of a large number of witnesses in direct conflict, a judgment based upon questions of fact will not be reversed, unless against the decided preponderance of the evidence.

Appeal from the District Court of the United States for the Northern District of Ohio.

This is an appeal from a judgment of the district court against the city of Cleveland for damages sustained by the steamer William Chisholm through a collision between the steamer and a drawbridge constructed and managed by the city of Cleveland. The opinion of SAGE, District Judge, clearly states the case and his conclusions of fact and law, and is as follows:

"The claim of the libel is for damages resulting from the collision of the steamer William Chisholm with the upper Seneca street drawbridge across the Cuyahoga river at Cleveland. The averments of the libel are that the steamer started from the Upper Furnace Dock, above the bridge, about 8:45 p. m., being in every respect staunch and strong, well manned, and equipped with the usual and necessary complement of officers and men, and that she was in tow of a harbor tug. As she approached the bridge she made a proper entrance into the starboard draw, which was the customary and usual draw for such vessels proceeding down the river. A craft was moored on the starboard or northerly side of the river, just below the bridge; and in consequence it was necessary for the steamer to, and she did, take a course close to the center protection, which extends above and below the center pier on which the bridge swings, and should extend out from the sides of the pier, and be of sufficient strength to ward off a vessel without coming in contact with the bridge when properly swung. When the steamer was about halfway through the bridge and was proceeding slowly and in the usual and proper course and manner, it was noticed by those in charge that the lower end of the bridge had been permitted by those operating it to swing out, and a little beyond the protection of the navigable part of the draw. The attention of those operating the draw was called to this circumstance, but they failed to correct the position of the draw; and, although the steamer was promptly backed, her forward fender on the port side rubbed against the bridge between the center pier and the lower end, and pushed that end of the bridge away. Thereupon those operating the bridge permitted it to swing around so that the upper end was out and over the side of the Chisholm, coming into collision with her cabin just abaft the boiler house; and although she was backing strong, and was brought to a standstill as quickly as possible, the bridge tore out the cabin, carried away the cranes and boat davits, and the roof of the cabin, and otherwise broke and injured the vessel to such an extent that the cost of making the necessary and proper repairs amounted to the sum of \$3,368.05, and the vessel was necessarily detained by reason thereof for a period of eight days, during which time her charter value, and the loss to libelants by being deprived of her use, was the further sum of \$511.08, making the total damage of \$3,879.05. Libelants aver that the Chisholm and her officers and crew were without fault, and, on information and belief, that the collision and damage

were caused solely by the negligence and carelessness of the defendant, and of its officers, agents, and servants who were in charge of the bridge and operating the same. The specific faults charged are: First, the insufficient width of the protection; second, not having and keeping the bridge open in a proper manner for the Chisholm to pass; third, permitting the lower end of the bridge to swing and extend out over the channel; fourth, failing to prevent the upper end from swinging out so as to come into collision with the Chisholm's cabin; and, fifth, that the attendants in charge of the bridge were inattentive and incompetent. The answer to the libel denies each and every averment of fault, and charges that the injuries resulted from the carelessness and negligence of the officers and crew of the Chisholm, and that the collision occurred solely through the fault of the Chisholm and her crew, and without any fault on the part of the respondent.

"It is admitted that the Cuyahoga is a navigable river. The Chisholm is 264 feet in length. Her width of beam is 36 feet 9 inches. She was light, drawing 11 feet aft and 5½ feet to 6 feet forward. She had been through the draw as often as once a week for several months or years prior to the collision, without damage to herself or to the bridge or protection. The distance from the outside of the central abutment of the bridge to the shore abutment on the starboard or northern side of the river is about 68 or 70 feet in the clear, and the width of the bridge is about 28 feet. The protection is composed of piles driven into the bed of the river, and extends 8 or 9 feet above the water, which was there about 15 feet deep, and deeper in the middle of the channel. The testimony for the city is that when the draw was open the side of the bridge and the side of the protection were exactly even, to use the phrase of one witness; that the bridge both above and below the center was flush with the protection, to use the phrase of another witness; and, according to the superintendent, that the protection throughout its length extended six inches further out than the bridge, so that, when the bridge was swung in line with the protection, its starboard side was six inches within the line of the protection. The superintendent, however, was recalled after having had the bridge opened, and seen how it stood with reference to the protection, and then admitted that, with the extreme upper end or corner of the bridge flush with the side of the protection, the lower end swung out over the channel and beyond the protection, and that, as a matter of fact, if the protection was put there for the purpose of warding off vessels and preventing contact with the bridge, it was not of a character suitable and efficient to accomplish that purpose; also, that if a man, in lining the bridge in the nighttime, with no guide excepting his eye, should get its upper end even two or three feet inside the protection, and hold the bridge there, a vessel coming down close to the protection would naturally strike the lower part of the bridge. Two other witnesses for the city (one an ex harbor master) testified that they did not consider that the protection was a safe protection for the bridge; that, to make it safe, it would be necessary to drive a row of piles outside the present piles; and that it was not as well protected as other bridges in the river. Two other witnesses for the city testified that the protection extended 12 inches further out than the bridge, throughout its entire length. The present bridge captain testified that, if one end is just inside the protection, the other end is somewhat outside, and that, because of this peculiarity in the bridge and its protection, and because it is customary for the large vessels to go within 4 or 5 feet of the protection, and often close up to it, it is necessary, and it is the practice of the bridge tenders, when a vessel is descending in the nighttime, as the Chisholm was, to hold the upper end of the bridge in until the bow of the vessel is safely entered, past the end of the bridge, and then straighten up the bridge so that the lower end may be flush with the lower part of the protection. The testimony of this witness is corroborated by that of four witnesses examined on behalf of the libelants, and is accepted by the court as the true statement of facts.

"The Chisholm came into the draw in a line substantially parallel with the line of the protection, and near the protection. At the time of the collision the stern of the vessel was but a foot or two from the upper part of the protection. The claim on behalf of the city, that she came down about the

middle of the channel, and sheered over so as to strike the protection at an angle near its lower end, and thereby threw the lower end of the bridge in and over the pier, and the upper end out, although testified to by two or more witnesses, is against the weight of the evidence. If such had been the position of the Chisholm when the protection and the bridge were struck, her stern must have been out to the center of the channel, at least, and the upper end of the bridge could not possibly have been thrown out so far as to have produced the collision. Several witnesses for the city testified that the Chisholm sheered. The testimony to the contrary is so strong as to make the fact exceedingly doubtful. But, if she did, there are strong grounds for the inference that it resulted from the displacement of water, and from the circumstance that the abutment on the shore of the northern side of the river forced the water against that side of the vessel, while on the other or port side there was much greater width, and opportunity for the water to flow away from the vessel. The weight of testimony is that the vessel did not sheer. The protection was inadequate. It was impossible to have the side of the bridge even flush with the protection for more than about half its length. If the side of the upper end of the bridge was exactly over the outer side of the protection, the side of the bridge, from a little below its center, projected over the channel; and, if the upper end of the bridge was 2 feet inside the protection, the lower end was several feet outside of it. The fact that a vessel was moored to the wharf on the northern side of the river, just below the draw, made it necessary that the Chisholm should come into the draw near the protection, because just below the bridge the river made a turn to the left, and, if the Chisholm had passed down along the middle of the channel, in swinging, her stern would have come into collision with that vessel. There is testimony tending to prove that the protection was marked with black paint, and the plank was cracked at the place where it is claimed the Chisholm sheered in and brought her bow in collision with the protection and with the lower end of the bridge; but that collision must have been by a vessel with dark paint, whereas the Chisholm was painted a light color, and had no dark paint.

"The decision of Judge Brown in *Edgerton v. Mayor, etc.*, 27 Fed. 230, is in point. That was a case of a collision with a bridge. The court held that the duty to take proper care of a bridge included the duty to make proper provision for the passage of vessels through the draw, and that the custodians of the bridge were bound to the use of ordinary diligence to avoid accidents to vessels going through in customary manner. The city was therefore responsible for the want of ordinary care on the part of its servants. In that case there were no guards beneath the draw to protect vessels approaching it. The court said that reasonable consideration for the safety of vessels going through such passages as there existed demanded that such guards should be constructed corresponding with the open projection, and that the duty to take proper care of a bridge included the duty to make proper provision for the passage of vessels through the draw. In that case there was a strong tide. In this case it is claimed by the city that there is a strong tendency to sheer, caused probably, as we have seen, by the displacement of water in the narrow channel. Upon the whole case, I am satisfied that there was no fault in the management or navigation of the Chisholm, that the protection was inadequate, and that the draw was not operated with proper care. The decree will be for the libelants, with a reference to ascertain the amount of the damage."

Miner G. Norton, for appellant.

Harvey D. Goulder, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The errors assigned with that particularity and distinctness required by the eleventh rule of this court (21 C. C. A. cxii., 78 Fed.

cxii.) challenge only the findings of fact by the district court. Full argument has been heard, and the entire evidence fully considered. The evidence was conflicting. The conclusions to be drawn therefrom depend largely upon the intelligence and frankness of the witnesses. The district judge saw and heard the witnesses testify, and was aided in arriving at his conclusions by his observations of the witnesses. This advantage we are deprived of. The act of February 16, 1875 (18 Stat. 315), was an act intended to relieve the supreme court of the labor of looking into the facts found by the circuit court in admiralty cases. That act has no application to this court, inasmuch as the act of March 3, 1891, creating courts of appeals, provides for a direct appeal from the district court to this court. There can be, therefore, no such special findings of law and fact by the circuit court as contemplated by the act of 1875. The trial here is therefore upon the law and the facts. *The Havilah*, 1 U. S. App. 1, 1 C. C. A. 77, 48 Fed. 684; *The Philadelphian*, 21 U. S. App. 90, 9 C. C. A. 54, 60 Fed. 423; *The E. A. Packer*, 14 U. S. App. 684, 7 C. C. A. 216, 58 Fed. 251. Notwithstanding this right of retrial here, the rule prevails that the judgment of the district court will not be reversed when the result depends alone upon questions of fact depending upon conflicting evidence, unless there is a decided preponderance against the judgment, where the trial judge saw and heard the witnesses, and had an opportunity of weighing their intelligence and candor. This was the rule applied in the circuit courts when the appeal was from the district to the circuit court. *The Rockaway*, 25 Fed. 775; *Levy v. The Thomas Melville*, 37 Fed. 271; *The Sampson*, 4 Blatchf. 28, Fed. Cas. No. 12,279; *The Sunswick*, 5 Blatchf. 280, Fed. Cas. No. 13,625; *The Albany*, 48 Fed. 565; *The Parthian*, Id. 564. It is the rule prevailing in the Second circuit court of appeals (*The Jersey City*, 1 U. S. App. 244, 2 C. C. A. 365, 51 Fed. 527; *The Royal and Superior*, 14 U. S. App. 30, 4 C. C. A. 285, 54 Fed. 204; *Aktieselskabet Banan v. Hoadley*, 20 U. S. App. 344, 9 C. C. A. 61, 60 Fed. 447), and in the Ninth circuit (*The Warrior*, 7 U. S. App. 560, 4 C. C. A. 498, 54 Fed. 534). The same rule was applied by this court in the case of *The Charles Hebard*, 6 U. S. App. 641-649, 5 C. C. A. 516, 521, 56 Fed. 315, 320, where District Judge Sage, speaking for the court, said:

"The record contains over four hundred printed pages of conflicting testimony, which it is impossible to reconcile. There are interested witnesses and incongruities of statement on both sides. The case turns entirely upon questions of fact. Most of the evidence was taken in open court, in the presence and hearing of the trial judge. It was carefully considered and carefully decided. Under such circumstances, the conclusions of the judge, who saw and heard the witnesses, and knew best what credit to give to their testimony, ought to have great weight with an appellate court, hearing the cause upon the record only, and without any additional evidence. The judgment below ought not to be disturbed, except upon a clear showing that it was wrong."

A like weight is attached to a finding of fact by a commissioner to whom a reference has been made in an admiralty cause, and it is difficult to see why at least equal weight shall not be given to a conclusion of fact drawn under like circumstances by the skilled and

trained intellect of the judge of the court. The Cayuga, 16 U. S. App. 577, 8 C. C. A. 188, 59 Fed. 483.

The record in this cause is a voluminous one. It presents a very wide conflict of evidence upon every material point in the case. To state its substance, or the reasons for any deduction we might draw, would be of no advantage. We are content to say that we find no reason for disturbing the conclusion reached by the very able and experienced trial judge who heard the witnesses in this cause testify, and was enabled to judge of their comparative knowledge, intelligence, and integrity. The fact that after such a hearing he found as he did is a fact of determining character on a record such as this. The judgment is therefore affirmed.

CAPE FEAR TOWING & TRANSPORTATION CO. v. PEARSALL et al.
(Circuit Court of Appeals, Fourth Circuit. November 1, 1898.)

No. 265.

1. ADMIRALTY—REVIEW ON APPEAL—DISCRETION AS TO OPENING DEFAULT.

The opening of a default in admiralty being discretionary with the court, under admiralty rule 39, a ruling on a motion to that end is not reviewable on appeal.

2. SAME—DECREE PRO CONFESSO—ASSESSMENT OF DAMAGES.

After a decree pro confesso on a bill in admiralty, as in equity, the amount of damages must be determined by the court from the evidence, and not from the allegations of the libel.

3. SALVAGE—DIVISION BETWEEN OWNERS AND CREW—REVIEW.

There is no fixed rule governing the division between the owners and crew of a vessel of the amount received or awarded for salvage services, and, where the division made by the trial court can be justified by the rules of law on any reasonable view of the case, it will not be disturbed on appeal.

4. SAME—BASIS OF DISTRIBUTION AMONG CREW.

The respective wages received by the members of the crew of a salving vessel affords a proper basis for the distribution between them of the share of the salvage awarded to them.

5. SAME—DIVISION IN PARTICULAR CASE CONSIDERED.

Where salvage operations were conducted from the home port of the owners of the salving vessels, and directed by them, and the services involved no special danger to either vessels or crews, a division of the salvage giving the owners two-thirds, and distributing the remaining one-third among the crew in proportion to their wages, will not be disturbed on appeal.

Appeal from the District Court of the United States for the Eastern District of North Carolina.

This case comes up on appeal from the district court of the United States for the Eastern district of North Carolina, sitting in admiralty. The libel is filed on behalf of Edward Pearsall, engineer, and John S. Brogan, fireman, of the steamtug Jacob Brandow, and J. N. St. George, cook of the steamtug Blanche, and Ephraim Swain, fireman of the steamtug Alexander Jones. These three tugs were engaged in salving the steamship Ardrishaig on the 27th of January, 1897, ashore on the east side of Frying Pan shoals. The owner of the tugs effected a settlement with the owners of the steamship, and received the sum of \$13,000, in full of all demands. The libelants claim a share in this award. The libel was filed by the libelants named on

the 3d of November, 1897. Monition was made returnable on the 10th November thereafter. Respondent entered no appearance, and filed no answer or defense to the libel at the return of the monition. On the evening of that day the clerk of the district court received a postal card from the proctor of the respondent, saying, "Defendant appears, and asks for thirty days to answer." He filed no stipulation, and gave no security for costs. Meanwhile the proctor for libelants, upon the return of the monition, had entered in the order book a motion for a decree pro confesso, and thereupon gave notice to the proctors of the respondent that on the 29th of November he would call up the cause, and ask for a decree therein. The court met on the 29th November, and sat for one week. On the last day of the term the proctor for the libelants asked for, and obtained from the court, a final judgment pro confesso upon default of the respondent. The court decreed that the owner of the tugs was entitled to two-thirds of the salvage award, and ordered the remaining one-third to be distributed among the masters and crews of the tugs proportionately, and thereupon referred it to a commissioner to take testimony for the purpose of ascertaining the respective shares of the masters and crews. On the 7th of December the respondent, making special appearance for that purpose, filed a petition with the court, asking that the judgment pro confesso be set aside, and, if that was refused, prayed further relief in the matter. On the 15th December the proctor for respondent filed an affidavit giving certain reasons for his failure to be present or to take exception when the order was presented to the court on the last day of the term, and thereupon prayed that the default be set aside, and that he be allowed to answer; and on the same day he filed exceptions to the libel. On the 16th February, 1898, respondent entered a stipulation for costs, and on the 24th February, 1898, he filed certain exceptions to the libel, and gave notice of a motion to strike out the default; and with that he prepared an answer to the libel, with an affidavit explaining again why he had not acted more promptly. His honor, the district judge, refused to set aside the default, or to grant any of the motions or prayers of the respondent. Pursuing the order of the court, the commissioner made his report on December 15, 1897; and, upon consideration thereof, the court, by decree dated February 22, 1898, awarded to the libelant Edward Pearsall, as his share of the salvage money, \$500; John F. Brogan, \$200; J. Newton St. George, \$200; and Ephraim Swain, \$200. This award was made in proportion to their wages. The commissioner, having first fixed the ratio to which each tug was entitled in the whole award, reported the facts, upon which the court fixed the distribution of the one-third of the whole salvage award allowed to the masters and crews of the tugs as their share therein. In due course an appeal was allowed from the decree of the court, and it is here on the assignments of error. These assignments of error are 14 in number. They go to the entering of the decree pro confesso; to the refusal of the court to entertain the motions to set it aside, or to listen to the exceptions; to the giving the libelants any share in the sum awarded to the owners of the tugs; to the amount decreed in favor of the libelants; and also an exception to the whole proceeding, that upon the case made by the libelants the court should have dismissed the libel.

Iredell Mears (Thomas Evans, on the brief), for appellant.

A. M. Waddell, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

SIMONTON, Circuit Judge (after stating the facts). The twenty-ninth rule of the circuit court in admiralty provides as follows:

"If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken pro confesso against him, and the court shall proceed to hear the cause ex parte and adjudge therein as to law

and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor."

So, also, in rule 40 the following provisions are made:

"The court may in its discretion, upon the motion of the defendant and on payment of costs, rescind the decree in any suit in which, on account of its contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct."

It will be observed that, in the first of these rules, upon the application of the defendant, and upon his payment of costs, the court, in its discretion, may set aside the default. On the second of these rules, the court, upon the payment of costs, may rescind the decree, in a suit, made against a defendant on account of his contumacy and default. So the matter lies in the discretion of the court, and in the exercise of this discretion the court refused the motions made by the defendant below. When a matter is in the discretion of the court, the exercise of that discretion is not reviewable in the appellate court. Thus, amendments to pleadings are within the discretion of the court, and its action granting or refusing such amendment cannot be reviewed in the supreme court of the United States. *Bullitt Co. v. Washer*, 130 U. S. 142, 9 Sup. Ct. 499; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 Sup. Ct. 736. The granting or refusing of a new trial is within the discretion of the court, and its action cannot be reversed in the circuit court. *Railway Co. v. Struble*, 109 U. S. 381, 3 Sup. Ct. 270. Setting aside a default, like a motion for a new trial, lies entirely in the discretion of the trial court. *Ex parte Roberts*, 6 Pet. 216. So a motion for a change of venue is not reviewable. *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696. Nor the granting or refusing of a continuance. *Means v. Bank*, 146 U. S. 620, 13 Sup. Ct. 186. All questions as to surprise, as to reopening a case, as to the order of proof, are matters of discretion, not reviewable. *Ames v. Quimby*, 106 U. S. 342, 1 Sup. Ct. 116. Decisions which rest in the discretion of the court below cannot be examined in the appellate court. *Cheang Kee v. U. S.*, 3 Wall. 320. And generally where the action of the inferior court is discretionary its decision is final. *Earnshaw v. U. S.*, 146 U. S. 60, 13 Sup. Ct. 14. This motion to reopen the default having been within the discretion of the court below, its action cannot be reviewed here.

It is insisted, however, that the libel, as filed, does not state facts sufficient to sustain the action, and would have been open to demurrer, or a motion to dismiss. "Upon writ of error to reverse a judgment by default, defects in pleadings which could have been taken advantage of before judgment by general demurrer may be reviewed." *McAllister v. Kuhn*, 96 U. S. 87. The libel, although not as clear and distinct as it should be, does sufficiently show that the libelants were of the crews of the tugs which rendered the service, and that they did render the service at and during the salvage. Were the question

one for a jury, the jury could reasonably infer it. This objection is overruled.

One of the assignments of error is as to the amount of salvage allowed the libelants. The default admits all the facts stated in the pleading, but it does not admit the amount of unliquidated damages claimed. In the libel filed in this case no specific amount is claimed. That is to be ascertained by the court. In common-law cases, damages after a default must be found by a jury. *Raymond v. Railroad Co.*, Fed. Cas. No. 11,593; *U. S. v. White*, Fed. Cas. No. 16,686. And, as the effect of a default to appear in an admiralty proceeding is ordinarily the same as in other actions at law (*Miller v. U. S.*, 11 Wall. 268) such damages must be found by the court upon the testimony taken (*Hightower v. Hawthorn*, Hemp. 42, Fed. Cas. No. 6,478b). The rule in equity, which also is clearly applicable to admiralty, is thus stated in *Ohio C. R. Co. v. Central Trust Co. of New York*, 133 U. S. 83, 10 Sup. Ct. 235:

"A decree pro confesso is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it. It should be made by the court according to what is proper to be decreed upon the statement of the bill assumed to be true."

The decree of the court below will be examined from this point of view. We are not called upon to estimate the value of the salvage service rendered in this case. The parties most concerned therein (the chief salvors and the salvaged) have fixed this value at \$13,000. The questions to be dealt with are the interest of the crews of the tugs in this award, and the amount of such interest. There can be no doubt that the crews of the tugs which did the salvage service are entitled to share in the award. *The Henry Ewbank*, 1 Sumn. 400, Fed. Cas. No. 6,376; *The Waterloo*, 1 Blatchf. & H. 114, Fed. Cas. No. 17,257; *The Leipsic*, 5 Fed. 108, affirmed 10 Fed. 585; *The Adirondack*, 5 Fed. 215. In the last two of these cases the owners of the salvaged vessel had done as was done in this case. They pursued the claim for salvage in their own names, without joining the master and crew. The proper practice was declared to be to apportion the entire amount, when ascertained, between the vessel, master, and crew, and to deposit the share of the master and crew in the registry to await their application therefor. The rules governing the division of the salvage award between the owners of the salvaging vessel and its master and crew have been somewhat modified. The later decisions are much more liberal towards the owners of the salvaging vessel. It is thus stated in *The Pomona*, 37 Fed. 816:

"Under the rule once prevailing in admiralty, the owners of the salvaging vessel could not receive more than one-third of the award (*The Blaireau*, 2 Cranch, 240; *The Henry Ewbank*, 1 Sumn. 426, Fed. Cas. No. 6,376; *The Cora*, 2 Wash. C. C. 80, Fed. Cas. No. 1,621), unless there were unusual circumstances of peril to the salvaging vessel (*The Henry Ewbank*). In *The Island City*, 1 Black. 129, it seemed to be admitted that where the salvaging vessel was a steamer, and so capable of rendering the most efficient aid, her proportion should be greater; and this is recognized in *The Raikes*, 1 Hagg. Adm. 246; *The Earl Grey*, 3 Hagg. Adm. 363; *The Beulah*, 1 W. Rob. 477; *Brooks v. The William Penn*, 2 Hughes, 144, Fed. Cas. No. 1,965. In *The C. W. Ring*, 2 Hughes, 99, Fed. Cas. No. 3,525, decided by Judge Bryan, late judge of this district, as referee, before his court was organized, in 1866, the question

was considered, and the proportion of the salving vessel—a steamship—in the award was raised to three-fifths. In *The Leipsic*, 5 Fed. 108, Judge Choate, of New York, had this question before him. The circumstances of that case were almost the same as in the case of *The Pomona*. A steamship, disabled because of a broken shaft, dependent upon her sails, which were injured, was rescued by a passing steamer; there being no present, imminent danger to the salving vessel or her crew; the essential feature of the service being its prompt and efficient action. Judge Choate allowed the salving steamer three-fifths of the award. He adopted the same rule in *The Adirondack*, 5 Fed. 215.”

In the case of *The Leipsic*, on appeal, Judge Blatchford increased the award, and allowed the salving steamer three-fourths. 10 Fed. 585. In the case of *The Pomona* the proportion allowed to the salving vessel was four-fifths. In the case at bar the court below allowed two-thirds. An examination of the cases will show that there is no fixed rule with regard to the proportion in the salvage award allotted to the owners of the salving vessel. Most frequently salvage services are rendered upon a voyage, in the absence of the owners, and when the salving vessel is under the charge of, and is controlled by, the master and crew. As salvage is awarded for the encouragement of promptness, energy, efficiency, and heroic endeavor in saving life and the property in peril, the claims of the master and crew who exhibited these qualities must meet the most favorable consideration. At the same time an allowance is made for the owners whose property has been imperiled. But when the owners direct the service, or when the peril encountered is chiefly that of the salving vessel, with no proportionate peril to the crew, an award to the owners is more liberal. An instance of this is *The Edam*, 13 Fed. 137. In the case at bar salvage service was rendered at the home port, the residence of the owners of the tugs. There was no exposure to any unusual peril of life. A very important part of the work—the removal of the cargo of the salved vessel—was rendered by laborers specially hired by the owners of the tugs for this purpose. During the progress of the salvage services the libelants were discharging their ordinary vocations under the pay of the owners. From these circumstances it would appear that the proportion sometimes allowed the master and crew—two-fifths—would be too large for the services rendered on this occasion. The court below evidently had this in mind, and allotted one-third instead of two-fifths. It may be that we might be inclined to think that even this was too large, but it is not so excessive as to require a modification of the conclusion reached by him. A decree in a salvage case will not be altered on appeal, as to amount, if it can be justified by rules of law on any reasonable view of the case. *The Excelsior*, 123 U. S. 40, 8 Sup. Ct. 33. In making his distribution of the share allotted to the masters of the tugs and the crews of the tugs only, the presiding judge made the distribution in proportion to the wages received by them, respectively. In this he is sustained by the authorities. In *Brooks v. The William Penn*, 2 Hughes, 144, Fed. Cas. No. 1,965, the salvage award was distributed between the master and the crew with regard to their responsibility in their different stations. In *Sewall v. Nine Bales of Cotton*, Fed. Cas. No. 12,683, the distribution was in proportion to the wages. This was adopted as a just and uniform rule in all ordinary cases.

The same rule was followed in *The New Orleans*, 23 Fed. 909, and in *The C. W. Ring*, supra, and also in *The Pomona*, 37 Fed. 816. See, also, *Cohen*, Adm. 149. The motion made by the appellees to dismiss the appeal is refused. The decree of the district court is affirmed, with costs. Affirmed.

THE ZOUAVE.

(District Court, E. D. New York. May 11, 1898.)

1. COLLISION—STEAMERS CROSSING—DUTY TO KEEP AWAY.

When steamers are approaching on intersecting lines, the one having the other on her starboard hand must keep out of the way; and, if she attempts to cross her bow, the privileged vessel will not be held in fault for not stopping, unless danger is apparent, especially when to do so would permit the strong tide to set the vessel in the direction in which the crossing vessel was proceeding.

2. SAME—TUG AND TOWS—USE OF BRIDLE.

The system of towing by means of a bridle is neither uncommon nor in itself unsafe, and where the bridle breaks on a sudden strain, caused by the tug's starboarding to avoid an approaching vessel, the tug will not be held in fault, in the absence of proof that the bridle was too small, or out of repair, or otherwise insufficient.

3. SAME—TUGS WITH TOWS.

A tug going up the East river and approaching Hell Gate by the eastern channel, held not in fault for crossing the bow of another tug coming down the river against a strong tide, and which was hugging the eastern shore, to hold her tows against the tendency of the tide to set them towards the western shore, it being apparent that, if the former tug went to starboard, she would interfere with this maneuver, of the other, and create danger of collision.

4. SAME—STEAMERS APPROACHING BEND—HELL GATE—SIGNALS.

Tugs approaching Brown's Point, near Hell Gate, are subject to inspector's rule 5, which requires a steamer "nearing the short bend or curve in the channel, where, from the height of the banks or other cause, a steamer approaching from the opposite direction cannot be seen for a distance of half a mile," to give one long blast of the whistle, and a failure to do so places them in fault when collision results from failure to see each other in time.

5. SAME.

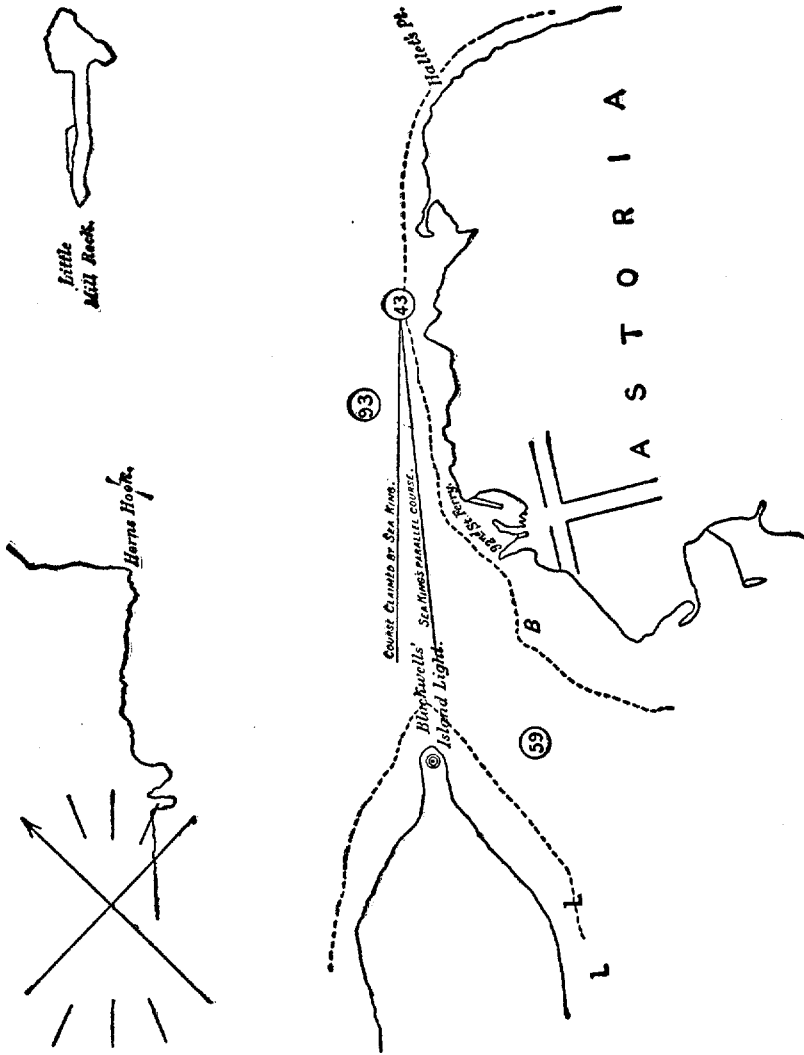
Inspector's rule 5, requiring the pilot of a steamer approaching a sharp bend, etc., to give a long blast of the whistle "when he shall have arrived within a half a mile of such curve or bend," does not require the signal to be given immediately on reaching a point a half a mile distant; and a steamer which, after giving the signal, or reaching a point where it should be given, stops at a wharf, or is otherwise detained, is not relieved from the duty of giving it when she resumes her approach to the bend.

6. SAME.

Failure to give the signals required by inspector's rule 5 where a steamer is approaching a bend places the burden on the delinquent steamer of showing that such failure did not contribute to the collision, and in the absence of such showing, she will be held in fault, though it be not affirmatively shown that the omission did contribute to the collision.

This was a libel in rem by Charles J. Tice, owner of the barge *Ada* No. 6, against the steamtugs *Zouave* and *Sea King* and the barges *Chalmette* and *J. F. Merry* to recover damages resulting from a collision in the East river at Hell Gate.

The following is a copy of the map referred to in the opinion:



Carpenter & Park, for libelant.
Stewart & Macklin, for the Zouave.
Benedict & Benedict, for the Sea King.
Black & Kneeland, for the Chalmette and the J. F. Merry.

THOMAS, District Judge. On the 28th day of October, 1894, at about 7 o'clock in the evening, the steam tug Zouave was going up the East river with a strong flood tide. She had in tow three barges on her port side, two loaded with sand and one with coal, and two barges on her starboard side, loaded with coal; the barge Ada No. 6, belonging to the libellant, being on the starboard side. The steam

tug Sea King was coming down the river, towing, by a hawser about 120 feet in length, two empty barges; the J. F. Merry being on the starboard side, and the Chalmette being on the port side. The hawser ran directly from the tug to the Chalmette, with a bridle extending from the tug to the Merry, whose bow was about eight feet astern of the bow of the Chalmette. The tide was running swiftly around Hallett's Point, and in consequence thereof, and the burden of her tow, the Sea King, after struggling for an hour to pass the point, finally reached a position about midway between such point and the Astoria ferry. This point is designated on the map as 43, in a circle. Her position in the channel was about 250 or 300 feet from the Astoria shore, and about 1,000 feet from the Astoria ferry. While in about this position, she received two signals from the Zouave, indicating the intention of that tug to go to port, and to pass the Sea King on the starboard side. Then the Sea King for the first time saw the Zouave, and immediately answered the latter's signals. The signals of the Zouave were given when she first saw, or could have seen, the Sea King, and the latter tug could not have seen the Zouave at a greater distance. After the interchange of signals as above stated, the Sea King put her helm hard a-starboard. The helms of the barges were in that position, and were so continued. The Zouave also starboarded. The tugs passed each other, their starboard sides being about 50 to 65 feet apart; but, it thereupon appearing to those in charge of the Zouave that there was danger of her colliding with the Sea King's tow, the Zouave gave a danger whistle, and thereupon both vessels stopped as soon as possible. It appears that when the Sea King went to port in obedience to the signals, the bridle running to the barge Merry broke, which caused the tow, instead of following the lead of the tug eastwardly, to continue somewhat southwestwardly, under the influence of the tide which set northwestwardly. This tended to bring the Sea King's tow nearer to the Zouave and her tow, and before the Sea King could get sufficiently to the eastward to draw her tow safely away from the Zouave, the bows of the Merry and Chalmette struck the Ada No. 6 on her fore quarter, causing the injury for which the libel is filed. The collision occurred at the point on the map marked 93, in a circle.

The question of the liability of the tug Sea King may be considered first in order. The Sea King contends that her course, when she heard the whistles of and sighted the Zouave, was about southwest, with Blackwell's Island lights about one point off her port bow. Such course is marked on the map appended to the opinion, "Course claimed by Sea King." If now it be accepted that the Zouave, as her captain claims, was at this time at the point on the map marked 59, in a circle, it is apparent that the Zouave must have seen first the Sea King's red light. In such position she would show only her green light to the Sea King. Now, let it be assumed, that the Zouave at this juncture gave two whistles, indicating her intention to pass the Sea King starboard to starboard. Without discussing at this time the propriety of this signal, was the Sea King at fault in accepting it? The Sea King immediately starboarded and pointed towards the Astoria shore, changing her course several points, and as much

as was practicable. Such starboarding brought the Sea King into the second position claimed by her, when her red light would be shut in, and her green light would be disclosed to the Zouave as the result of obedience to the Zouave's signal. It is not apparent that the Sea King was in fault under such circumstances. But now, if it be contended that the Sea King was not pointed so far to the westward when first discovered by the Zouave, but was headed upon a course appropriate to take her along and parallel to the Astoria shore, marked on the map, "Sea King's parallel course," still the red light of the Sea King would first appear to the Zouave, and still the Zouave would show only her green light to the Sea King. If, thereupon, the Sea King starboarded, and turned to the eastward, directly towards the Astoria shore, which is her second position, as claimed by herself, and as conceded by the Zouave, still the Sea King had done everything that was required of her in obedience to the Zouave's signal. But the Zouave claims that at the time of sighting the Sea King the green light of the Sea King was first seen, and only that light was disclosed at any time. Such a condition would show a course on the part of the Sea King which, if pursued, would carry her upon the Astoria shore, and the evidence of the captain of the Zouave shows that after the signals the Sea King was not only headed for the Astoria shore, but that she was very close to the same. The evidence also shows that after the signals the Sea King starboarded. But whether the Sea King did thereafter starboard, she was in any case pointed for the Astoria shore. If the Sea King was pointed to the Astoria shore, and the Zouave signaled to go to port, it would seem that she could do nothing more to effect a safe passage; and if it be considered that the Sea King starboarded, and pointed still more to the Astoria shore, no other duty was required of her to commend her to credit. It must be remembered that the Sea King was but 200 or 300 feet to the westward of the Astoria shore, and if, after the signals were given, she was heading in the direction claimed by the captain of the Zouave, or changed her course still more to the eastward, she could have done nothing more. Hence it must be held that in maneuvering the Sea King was innocent of wrong.

But it is said that when the Sea King heard the Zouave's signal, and considered that the Zouave was running across her course, she should have stopped, and have given the alarm signals. This proposition, logically stated, is this: (1) The Zouave was running across the Sea King's bows, with a strong tide sweeping to the westward. (2) The Zouave undertook to cross the bows of the Sea King, which she saw on her starboard hand. (3) The Sea King should, in the darkness, have been so keenly alive to the possible danger of such an attempt that she should have arrested it by danger signals, as she was not permitted to cross the signals of the Zouave. This would place the burden of the situation upon the Sea King, while the law places the burden on the Zouave. *The E. A. Packer*, 140 U. S. 366, 11 Sup. Ct. 794. Where ships are running on intersecting lines, the one which has the other on her starboard side must keep out of the way of the other. *The Cayuga*, 14 Wall. 270; *The Corsica*, 9 Wall. 630; *The Columbia*, 10 Wall. 246. Moreover, it is not apparent from

the evidence that the Sea King's captain foresaw with sufficient clearness the danger of the Zouave's maneuver to enable the court to say that the Sea King should have assumed to decide that the passage could not be effected according to the Zouave's manifest design. The tide was sweeping to the opposite shore; the vessels were about 1,800 feet apart; the night was dark, but clear; the Sea King was on a proper course, and immediately made every effort to withdraw herself and her tow to the eastward. It cannot be said fairly that at the time due skill and care required the Sea King's captain to stop, and risk the consequences of the tide setting her across the channel, and, maybe, into collision with the Zouave, who would be carried by the tide in the same direction. What would have happened under such circumstances is entirely problematical. But it is beyond doubt that, had the Sea King pursued this course, it would have been energetically claimed in this court that the Sea King should have turned, promptly and vigorously, her bow to the Astoria shore, and have used every effort to clear her tow from the course of the Zouave.

It is further alleged that the Sea King was not attached to the tow by a proper hawser, that the bridle running to the Merry was an unsafe device, and that a separate hawser should have been used for each boat. The hawser was of sufficient strength; it did not break; and, if the bridle was as strong as due care required, no fault can be urged, as the system of thus conveying a tow is neither uncommon nor in itself unsafe. There is no evidence that the bridle was too small, or out of repair, or otherwise insufficient. The sudden strain upon the hawser caused by the Sea King's starboarding, resulted in the lines parting. As a consequence, the tow either did not follow the Sea King with promptness, or sheered to the westward, or kept along on a southwesterly course. The conclusion is inevitable, upon a careful survey of the case, that this parting of the bridle was a contributing cause of the accident; and if it appeared that there had been a lack of care in the selection of the rope for the bridle, such failure would have established the liability of the Sea King. No such evidence is given, and hence it must be found that no such negligence has been established. Indeed, the insufficiency of the rope does not seem to have been made an issue beyond this: that the system of using any bridle was improper.

Another fault charged against the Sea King is that she failed to provide a proper lookout. Regarding this it is enough to say that the tugs sighted each other as soon as the bend in the Astoria shore, the ferry rack, and the ferryboat therein, would permit. If it was a negligent omission to employ the captain and mate at the wheel, and to act also as lookout, yet the omission did not contribute to the accident, and only those negligent acts or omissions which are efficient causes of an injury can establish liability.

There is but one other question of fault respecting the Sea King, and the same culpability is alleged against the Zouave, viz. that they did not give a proper warning signal when approaching the bend. Before considering this, however, the question of the Zouave's liability from other acts or omissions charged may be discussed. If the Sea King was in the position claimed by the Zouave, the Zouave saw her

green light. If the course of the Sea King was such as the Sea King claims, or was parallel with the Astoria shore, the Zouave saw the Sea King's red light at the outstart. If now it be concluded that the Zouave first saw the Sea King's green light, the Zouave was privileged to go to port, and pass starboard to starboard, as then the position would be green to green. But what shall be said if the Zouave saw the port light of the Sea King? Then the position would be, the Zouave's green light to the Sea King's red light. In such case the Zouave knew that she was crossing the Sea King's bow. She might either go to starboard, so that the tugs would pass port to port, or the Zouave might proceed across the Sea King's bow, if the time, distance, and circumstance justified. Respecting this the supreme court, in *The E. A. Packer*, 140 U. S. 366, 11 Sup. Ct. 796, has said:

"While this duty of avoidance is ordinarily performed by porting and passing under the stern of the other vessel, and while this is evidently, under ordinary circumstances, the safer and more prudent course, cases not infrequently occur where good seamanship sanctions, if it does not require, that the maneuver shall be executed by starboarding, and crossing the bows of the approaching vessel. Of course, in doing this the steamer takes the risk that the approaching vessel, while fulfilling her own obligation of keeping her own course, may reach to the point of intersection before she has passed it herself. And hence at night, or in thick weather, the maneuver will be likely to be attended with great danger."

It thus appears that the obligation of the Zouave to port may be modified by circumstances. The tide swept strongly to the New York shore. The Sea King was from 200 to 300 feet from the Astoria shore, fighting the tide to get into position to pass properly into the west channel. Would it have been safer for the Zouave to have ported, and attempted to pass between the Sea King and the Astoria shore? This would have resulted in compelling the Sea King to change her course, assuming that it was as claimed by the Zouave, or even as claimed by the Sea King itself, so that she, with her tow, would have been brought fully under the influence of the tide, which she was undoubtedly using every effort to resist. The Sea King was probably bucking the tide, although her general course somewhat tended to the west channel, and it was probable that in so resisting the tide she may have turned her bow temporarily towards the Astoria shore, and thus showed the Zouave her green light. In such case the green light would not properly disclose the Sea King's intended course. Under these conditions the rule was not exacting that the Zouave should go to starboard, and it does not seem that such would have been the safer maneuver. As there would have been little room for the Zouave to pass between the Sea King and the Astoria shore, with the tide carrying her to the westward, it is perfectly apparent that, whatever light the Sea King disclosed to her, great danger threatened such a maneuver. Therefore the court is unwilling to determine that under the exigencies of the situation, the Zouave was negligent in failing to adopt the starboard course.

It remains to be considered whether the tugs duly gave the long blast of the whistle before approaching the bend at the ferry, known as "Brown's Point," and, if not, whether such an omission was negli-

gence. The Sea King concedes that she did not give the warning, but the Zouave claims that she did give the signal at Lunatic Rock. The captain of the Zouave, and her pilot, testify to this. The captain testified that the whistle was a long one, "probably a minute or a little more," and that it could be heard a long way off. The witness states that the Zouave was then probably 100 or 200 feet below or southerly of Lunatic Rock. The pilot of the Zouave states that the long whistle was given "right before we got to Lunatic Rock," maybe half a minute away from the same. Three other witnesses were called by the Zouave,—her engineer, and also Norton and Smith,—each of the two last being in charge of boats in the Zouave's tow, and in positions to hear the long whistle had it been given. The engineer of the Zouave, Norton and Smith, state that they heard the signals interchanged by the tugs, but the engineer and Norton testify that they did not hear any other whistle from the Zouave, and Smith does not state whether he heard it. The captain of the Ada No. 6, in the Zouave's tow, was in a position to hear. He did hear the interchange of signals, but did not hear the long whistle. The captain of the Zouave states that the long whistle could be heard a long way off. The signals were interchanged when the tugs were about 1,800 feet apart. The long whistle is claimed to have been given when the tugs were 2,300 or 2,400 feet apart, as the measurements on the chart will show. The captain and mate of the tug and the captains of the Merry and Chalmette plainly heard the whistles interchanged, but none of them heard the long whistle. Under this state of facts, what is the truth? On which side is the preponderance of evidence, considering the relations of the parties to the transaction? The conclusion seems inevitable, when all heard the two whistles, and no one, save the captain and pilot of the Zouave, heard the long whistle, that such signal was not given. The question, then, is, should it have been given? The captain of the Zouave says it was customary for tugs in his position to give it. However, the essential question is, was the omission of the tugs to give the warning signal a violation of the rule? This is purely a question of law, and involves no questions of fact other than those above decided. The rule is as follows:

Rule 5: "Whenever a steamer is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steamer approaching from the opposite direction cannot be seen for a distance of half a mile, the pilot of such steamer, when he shall have arrived within half a mile of such curve or bend, shall give a signal by one long blast of the steam whistle, which signal shall be answered by a similar blast, given by the pilot of any approaching steamer that may be within hearing. Should such signal be answered by a steamer upon the farther side of such bend, then the usual signals for meeting and passing shall immediately be given and answered; but, if the first alarm signal of such pilot be not answered, he is to consider the channel clear and govern himself accordingly."

The tugs were approaching Hell Gate, which, notwithstanding the removal of Flood Rock, is a place dangerous for navigation, and one that requires a high degree of diligence on the part of a vessel, not only for its own safety, but also for the safety of other vessels that may be making a passage through the Gate. The bend at Brown's Point is sharp, and curves several points eastwardly. The distance

between Hallett's Point and Brown's Point is about 1,900 feet, and the lights of a vessel passing between such two points might not be seen by a vessel coming up the east channel, until the point had been nearly reached. Hence, whatever should be done to effect a safe passing of boats must be done within a limited space. In the same way, a vessel approaching Brown's Point from the south, through the east channel, might not be seen by a vessel beyond such point until the former vessel was nearly at the point. In the present case the tugs were only about 1,800 feet apart when they sighted and signaled each other; and, while the vessels might be so situated that this interval would be increased, yet their localities might be such that the intervening space would be much diminished. The tide sets strongly through the Gate, and burdened vessels are greatly affected in their speed and course by its influence. This Gate, whose perils are well recognized, is a common pathway for ships of all descriptions, both during the day and night, and the tugs in question were about to pass through it in utter disregard of the rule above quoted. They were nearing a short bend or curve. From the height of the banks or other cause, in this case the intervening land and the ferry house and racks, a steamer approaching from the opposite direction could not be seen for a distance of half a mile from either direction. The rule declares in such a case that the pilot, "when he shall have arrived within a half a mile of such curve or bend, shall give a signal by one long blast of the steam whistle, which signal shall be answered by a similar blast, given by the pilot of any approaching steamer that may be within hearing. Should such signal be so answered, then the usual signals for meeting and passing shall immediately be given"; but, if the first alarm signal of such pilot be not answered, he is to consider the channel clear, and govern himself accordingly. Neither tug complied with this rule, so emphatically applicable. Had the Zouave complied with it, there is a strong presumption that the Sea King would have heard the signal; and an observance by the Sea King of the rule might have conveyed notice of her approach to the Zouave.

In behalf of the Sea King it is claimed that an observance of this rule would have been powerless to prevent the accident. It is contended that the Sea King would have been to the eastward of Hallett's Point when the signal was required, and, as the Sea King was detained at Hallett's Point for about an hour in her effort to pass it, the Zouave would have been some miles down the river at the time such signal was due. The argument is this: (1) The warning must be necessarily given a half mile away from the bend for which it is intended, and hence in this case to the eastward of Hallett's Point; (2) the Sea King was detained at Hallett's Point for an hour after the signal was due and should have been given, if at all; (3) hence the Zouave was at least an hour away down the river when the signal should have been given, and could not have heard it. The position seems defensible neither in logic nor in law. The fifth rule does state that the pilot shall give the signal "when he shall have arrived within a half mile," etc. The above argument would construe this to mean that at the furthest point within a half mile from the bend the signal should be given, and that such signal, if so given, would satisfy, once

for all, the obligation of the statute, and all other obligation to give a warning signal. Hence, if the vessel be detained for an hour in one place before coming to the bend, the duty performed an hour before would be all sufficient. It is obvious that the letter and spirit of the statute forbid such interpretation. The statute commands a vessel nearing a bend, and when within a half mile thereof, to give a signal. It is intended that the signal shall be given at some time when the vessel is so nearing the bend that it may be heard by vessels approaching from the opposite side of the bend. It does not command nor intend that the signal may be given just within the half mile, and that the signaling vessel may then lay to, or go to anchor, or go into a dock, or be detained at an impassable point for an hour, and then silently proceed towards the bend, in reliance upon the signal given at a time so far past that it is at the later time useless for the purposes of warning. The statute contemplates an uninterrupted and continuing forward movement of the signaling vessel, and the sounding of the whistle with such reference to this nearing the bend, as may amply warn the approaching vessels, or enable the fact to be known whether there are such vessels, and, if so, allow time for making due arrangements for passing. The very fact of an hour's detention after giving such signal would of itself show that the past signal had become useless, and that another was required. Independently of the statute, the ordinary obligations of good navigation should require vessels to give signals when approaching a bend like that at Brown's Point, and this is illustrated by the situation in which the tugs found themselves in the present instance. Before their lights could be seen and signals given, they were so near to each other that proper arrangements for passing could not be perfected and executed. It is also urged by the Sea King that such warning was not required of her, as she was intending to go down the west channel, and was not intending to round the point and pass down the east channel. It will be noticed that the statute does not apply merely to vessels intending to round the point, but to vessels nearing a point. And as the Sea King was intending to pass the point, or near to it, for the purpose of pursuing her intended course, she was offering approximately the same danger to vessels coming up the east channel as would have been the case had she purposed to round the point. It must therefore be held that both tugs were negligent in not giving this required signal. If it be urged that it cannot be shown satisfactorily that the giving of such warnings would have prevented the collision, it may be replied that the failure to give such signals places the burden upon the offending vessels to establish that such failure did not contribute to the collision. The parties have not discharged this burden.

The above conclusions result from a prolonged and careful examination and study of the case. The liability of the tugs, as found, depends upon the proper solution of the legal question whether warning signals for Brown's Point should have been given. If the finding is erroneous, it is capable of ready correction. A decree should be entered in favor of the libellant, apportioning the damages, when ascertained, equally between the tugs, with costs.

LEDERER v. RANKIN et al.

(Circuit Court, S. D. Ohio, W. D. December 3, 1898.)

1. JURISDICTION OF FEDERAL COURTS—SUITS FOR INFRINGEMENT OF COPYRIGHTS—RESIDENCE OR CITIZENSHIP OF DEFENDANTS.

The act of January 6, 1897, amendatory of Rev. St. § 4966, relating to suits for the infringement of copyrights for dramatic or musical compositions, which authorizes the service and enforcement of injunctions granted in such suits anywhere in the United States, and confers jurisdiction on circuit courts of circuits other than that in which the suit is brought to entertain motions for the dissolution of such injunctions, does not affect the jurisdiction of a court to entertain the suit or grant an injunction with reference to the question of the residence or citizenship of the defendants.

2. SAME.

The provision of the law of 1888 requiring suits to be brought in the district whereof the defendant is an inhabitant does not apply to suits arising under the patent or copyright laws of the United States, of which the circuit courts have exclusive jurisdiction; and a suit, under Rev. St. § 4966, for the infringement of a copyright for a dramatic or musical composition, may be brought in any district where the defendant can be found and served.

On Motion to Set Aside Service of Summons.

Foraker, Outcalt, Granger & Prior, for complainant.
Jones & James, for defendants.

THOMPSON, District Judge. A motion was filed in this case on behalf of the defendants to set aside the service of the summons because the defendants are not, and never have been, residents, inhabitants, or citizens of this district. The motion is resisted by the complainant upon two grounds:

1. Because by the act of congress of January 6, 1897, amendatory of section 4966 of the Revised Statutes, jurisdiction is given, as it is claimed, to any circuit court to grant injunctions in such cases, without reference to the residence of the defendant,—whether in or out of the district in which suit is brought. In my judgment, it was not the purpose of this statute to deal with the question of locality, as affecting the jurisdiction of the court, but it was enacted, among other things, for the purpose of authorizing the service of, and to make operative, injunctions, in such cases, anywhere in the United States, and to confer jurisdiction upon the circuit court of any district to hear motions to dissolve and set aside such injunctions; and in such cases the court hearing the motion may call upon the court in which the suit was brought, and the injunction granted, to transmit “a certified copy of all the papers on which the injunction was granted.” When a suit is brought and an injunction is granted, the process may be served anywhere in the United States, and shall be operative everywhere in the United States; but the defendants may, in any circuit in which they may be performing or representing the dramatical or musical composition, move to discharge the injunction, and will not be compelled to go to the court in which the suit was brought.

2. The second ground upon which the motion is resisted is that the law of 1888, requiring suits to be brought “in the district whereof the

defendant is an inhabitant," only applies "to such cases whereof the state or federal courts have concurrent jurisdiction," and does not apply to cases of which the federal courts have exclusive jurisdiction. The ninth clause of section 629 of the Revised Statutes provides that the circuit courts shall have jurisdiction "of all suits at law or in equity arising under the patent or copy right laws of the United States." And section 711 of the Revised Statutes provides as follows:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states; * * *. Fifth. Of all cases arising under the patent right or copy right laws of the United States. * * *"

And these clauses of sections 629 and 711 were not affected or repealed by the law of 1888.

The supreme court of the United States, in *Re Keasbey & Mattison Co.*, 160 U. S. 229, 16 Sup. Ct. 273, say:

"In the Case of *Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, on which the petitioner in this case principally relied, the decision was that the provision of the act of 1888 forbidding suits to be brought in any other district than that of which the defendant is an inhabitant had no application to an alien or a foreign corporation sued here, and especially in a suit for infringement of a patent right, and therefore such a firm or corporation might be so sued by a citizen of a state of the Union in any district in which valid service could be made on the defendant. That case is distinguishable from the one now before the court in two essential particulars: First. It was a suit against a foreign corporation, which, like an alien, is not a citizen or inhabitant of any district within the United States, and was therefore not within the scope or intent of the provision requiring suit to be brought in the district of which the defendant is an inhabitant. See *Railway Co. v. Gonzales*, 151 U. S. 496, 14 Sup. Ct. 401. Second. It was a suit for infringement of a patent right, exclusive jurisdiction of which had been granted to the circuit court of the United States by section 629, cl. 9, and section 711, cl. 5, of the Revised Statutes, re-enacting earlier acts of congress, and was therefore not affected by general provisions regulating the jurisdiction of the courts of the United States concurrent with that of the several states."

So that as the law stands, as declared by these decisions, a suit arising under the patent-right or copyright laws of the United States may be brought in any district where the defendant can be found and served. In *re Hohorst*, 150 U. S. 659, 661, 14 Sup. Ct. 221; In *re Keasbey & Mattison Co.*, 160 U. S. 221, 229, 16 Sup. Ct. 273; *Southern Pac. Co. v. Earl*, 27 C. C. A. 185, 82 Fed. 690, 694; *Westinghouse Air-Brake Co. v. Great Northern Ry. Co.*, 84 Fed. 9; *Smith v. Manufacturing Co.*, 67 Fed. 801; *Button Works v. Wade*, 72 Fed. 298, 299; *Van Patten v. Railroad Co.*, 74 Fed. 981, 987; *Noonan v. Athletic Co.*, 75 Fed. 334. The motion, therefore, will be overruled.

POPE et al. v. HOOPES et al.

(Circuit Court of Appeals, Third Circuit. November 28, 1898.)

No. 2.

1. REFORMATION OF CONTRACT—SUFFICIENCY OF EVIDENCE — PRESUMPTION OF CORRECTNESS.

A court of equity cannot reform a written contract except upon clear proof of fraud or mistake, and where there is no evidence of fraud, and the testimony of the parties is in direct conflict, the presumption that the contract as made expressed the true agreement must prevail.

2. SAME—MISTAKE DUE TO NEGLIGENCE.

A court cannot relieve a party to a contract from a mistake due to his own negligence.

3. SAME—OPTION TO PURCHASE PROPERTY—POWER OF COURT TO EXTEND TIME.

Where parties, having, by a written contract, an option to purchase property therein described within a specific time, decline to make the purchase within that time, on the ground of a mistake in the description as expressed in the contract, and bring a suit to reform such description, and to enforce the contract as reformed, the court cannot, on an amended bill, extend the time within which the plaintiffs may elect whether or not they will accept the property as described in the contract, and decree a specific performance, as against the defendants, in the event of such acceptance.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a suit in equity by Elmer E. Pope and another against William G. Hoopes, Jr., and others for the reformation of a written contract, and its specific enforcement against the defendants as reformed. Plaintiffs appeal from a decree dismissing the bill.

The following opinion was delivered in the circuit court by KIRKPATRICK, District Judge:

"In October, 1894, Elmer E. Pope and Calvin N. Dotson, the complainants, entered into an agreement in writing with the defendants, in and by which they leased from the defendants a certain piece of ground in Atlantic City, N. J., for the period of two years, at a rental of \$500 for the first year and \$600 for the second year, which in the agreement was described as lying on the northerly side of the board walk and westerly of Connecticut avenue, and had a frontage of 50 feet on the board walk and of 340 feet on Connecticut avenue. The agreement also provided that the parties of the first part thereto (the defendants herein) would sell to the complainants herein, the parties of the second part, the following described lots of land, situate in said Atlantic City, bounded and described as follows: 'Beginning at a point in the westerly line of Connecticut avenue five hundred feet south to the southerly line of Connecticut avenue, and running thence, first, westerly and parallel with Oriental avenue, fifty feet; thence, second, southerly, at right angles to Oriental avenue, between parallel lines, of the width of fifty feet, with the westerly line of Connecticut avenue, for the easterly boundary of the same, to the exterior line of the riparian commissioners as established in the Atlantic Ocean,—at the expiration of one year from the date thereof, for the sum of fifteen thousand dollars, provided the parties of the first part had not sold said property before that time.' It also provided that the parties of the second part might purchase 50 feet on the rear or northerly side of the above-described tract fronting on Connecticut avenue, with a depth of 175 feet, at any time during said year, for the sum of \$3,500, provided said lot was not previously sold to other parties. Under this agreement the complainants entered into the possession of the leased premises, and erected thereon a more or less substantial building for exhibition purposes, at a cost

of several thousand dollars. On the 6th of September, 1895, the complainants notified the defendants that they would be prepared to accept deeds for the two tracts mentioned in the agreement, and pay the cash price for the same. It was soon discovered that there was a difference between the parties as to the quantity of land to be sold under the contract, the complainants herein insisting that the first tract was to be identical in its location and dimensions with that included within the lease, while the defendants contended that it comprised only that particularly described in the agreement, and which on the line of Connecticut avenue, measuring northerly from the board walk, fell short of that described in the lease by upwards of 100 feet. The location of the second tract on which complainants had an option was consequently disputed, inasmuch as it adjoined the first tract on its northerly side. On the 16th of September, 1895, and within the year after the date of the agreement, the complainants herein tendered to the defendants the sum of \$18,500, and demanded, for the sum of \$15,000, a deed for a lot having a frontage of 50 feet on the board walk, and running northerly 340 feet; and for \$3,500 a deed for a lot adjoining the above on the north having a frontage of 50 feet on Connecticut avenue, with a depth of 175 feet. The defendants declined to make deeds for the properties demanded, but offered 'to convey' to complainants 'the property described in said agreement in' their 'covenant to convey.' This offer of the defendants was refused by the complainants, and on the 8th day of October, 1895, they filed their bill of complaint herein, setting out that by a mistake, unintentional, or intentional and fraudulent, the defendants did not truly describe the premises which they by the agreement had taken the option to purchase, and praying that the agreement be reformed so that the description of the lots to be purchased should conform to the ones they had leased, and that a decree be made compelling the defendants to convey the premises accordingly. Testimony was taken from which it appeared that at the time of making the said agreement there were present Elmer E. Pope and Calvin N. Dotson, the complainants, and Allen B. Endicott, William G. Hoopes, and Barclay H. Bullock, the defendants, and a Mr. Rogers, who was then in the employ of Adams & Co., real-estate agents, who were acting for the complainants. Pope and Dotson both testify that the only pieces of ground spoken of at the time of drawing the agreement were the one included in the lease, which was 50 feet front on the board walk by 340 feet deep on Connecticut avenue, and the lot adjoining on the north, having a frontage of 50 feet on Connecticut avenue by a depth of 175 feet, and that they supposed that the option to purchase covered the same premises which were included in the lease; while Endicott, Hoopes, and Bullock swear that they distinctly refused to sell to the complainants the lot which they were willing to lease, and that they at that time gave complainants as the reason for such refusal that the sale of such a plot would not accord with their general plan of sale of the property of which this lot was a part, and that it would leave upon their hands a large piece of ground which would be inaccessible and practically worthless. They also say that it was because the land to be included in the lease and the land to be sold differed that a separate description was used for each,—a more particular description used for the land to be sold, and the beginning point located with reference to a fixed and unchanging monument, the same as had been used by them on that day in making sales of property on that tract to other parties. The testimony of the complainants and defendants is irreconcilable. Mr. Rogers, who both parties agree was present and took part in the negotiations, and at whose suggestion the option on the tract 50x175 was granted and taken, was not called as a witness. It was incumbent upon the complainants to prove that the written instrument did not truly set forth the terms of the agreement, and their failure to give the court the benefit of the testimony of this disinterested witness must work to their disadvantage. Upon the evidence presented, it is impossible for the court to say that the proof in demonstration of a mistake in the description of the land is clear and satisfactory. Its weight is rather to the contrary. Upon the one side is the testimony of the complainants; on the other, the written instrument, with its separate description of the land leased and to be sold, fortified by the assertion of the defendants that it was

not intended by the parties that the tracts should be identical. In *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 48, the court said: 'The writing must be regarded prima facie as a solemn and deliberate admission of both parties as to what the terms of the contract actually were;' and he who asks to have a written contract reformed must make out a perfectly clear case, free from doubt. *Hupsch v. Resch*, 45 N. J. Eq. 662, 18 Atl. 372; *Harrison v. Insurance Co.*, 30 Fed. 863. It seems that the difference of description was noticed by Mr. Pope when the agreement was sent to West Virginia, where he resided, for execution. No inquiry was made regarding the matter, but it was, he says, assumed that the option covered the same property as that leased. Against mistake due to negligent conduct the court will not relieve. *Haggerty v. McCanna*, 25 N. J. Eq. 48; *Voorhis v. Murphy*, 26 N. J. Eq. 435. After the proofs had all been taken, the complainants obtained leave to file an amended or supplementary bill, which, without setting up new matter, asks that the court, if it should find that the complainants were not entitled to a reformation of the description of the lots to be conveyed them by the defendants, so as to conform to the description of the lot leased, that then the complainants 'may be given an opportunity to elect whether they will take the same as described in the option, and, if they do that, the contract may be specifically enforced in the manner admitted by the defendants.' The complainants do not say that they are willing to perform the contract as it has been drawn and executed by them, but ask the court to give them an opportunity to elect whether at this late day they will exercise the option to purchase, which expired in October, 1895, and, if they do so elect, that the court will decree a specific performance. They ask the court to make a decree which would compel the defendants to convey, but leave them at liberty to reject the deed tendered in compliance with the decree. This the court cannot do. The remedy at the time of rendering the decree would not be mutual. In *Richards v. Green*, 23 N. J. Eq. 536, Chief Justice Beasley says: 'It seems to me that the rule is universal to this extent: that equity will not direct the performance of the terms of an agreement by the one party, when at the time of such order the other party is at liberty to reject the obligations of such agreement.' The tender made by the complainants in the exercise of their option was for the tract of land described in the lease. The defendants offered to convey 'the property described in said agreement in our covenant to convey.' This the complainants refused to accept, saying 'that they would not have anything only what the lease and option called for, the three hundred and fifty feet the building stood on, and the piece fifty by one hundred and seventy-five,' and we told them, said the witness, 'we intended to have all the lease and option called for.' Having thus refused to purchase the land according to the terms of the contract, the court cannot make a new agreement for the parties by extending the time in which they may elect whether they will or will not exercise the option. *Henderson v. Stokes*, 42 N. J. Eq. 588, 8 Atl. 718. The complainants are not entitled to the relief prayed for in the bill, and it should be dismissed, with costs."

Wm. Wilkins Carr and H. P. Camden, for appellants.

D. J. Pancoast, for appellees.

Before **ACHESON** and **DALLAS**, Circuit Judges, and **BUTLER**, District Judge.

BUTLER, District Judge. The decree is fully justified by the opinion of the circuit court; and we adopt it as an expression of our views. We will only say in addition that there is no such evidence of fraud or mistake as would warrant reformation of the contract; it is scarcely pretended that there is. Taking the paper signed by the parties, as it stands, the plaintiffs did not exercise their option to purchase within the time specified, and they are without excuse, tending to relieve them from the consequences. Their attention was

called to the terms of the contract, and their misunderstanding pointed out, in ample time to allow them to take the property described. Instead of taking it they declined to do so. At the time of filing their bill they were unwilling to take it; and still later when amending the bill they had not resolved to take it; and consequently asked further time to consider the subject. Time is of the essence of such contracts. If the plaintiffs had been misled respecting the terms (even without fault of the defendants) until the time for exercising the option had expired, they might, possibly, be excused, and relieved from the consequences; but in view of the facts they certainly cannot. The decree is affirmed.

CENTRAL APPALACHIAN CO. et al. v. BUCHANAN.

(Circuit Court of Appeals, Sixth Circuit. November 28, 1898.)

Nos. 586, 587.

1. **EQUITABLE SET-OFF—DAMAGES FOR BREACH OF WARRANTY—PARTY ENTITLED TO BENEFITS OF COVENANT.**

Where the owner of certain mines leased them to a corporation, and at the same time, as a part of the same transaction, sold and conveyed to the agent of the corporation both real and personal property used in connection with the mines, conveying both by the same deed, containing covenants of general warranty and of seisin, the grantor having knowledge that the purchase was made for the corporation, and that it paid the purchase money, but the agent taking the title to himself for purposes of his own, and afterwards conveying to the corporation, such corporation is entitled to the benefits of the covenants both as to the real and personal property, and may set off in equity, as against a judgment recovered against it for rental of the mines, damages accruing from a breach of the warranty by reason of a failure of its title through a prior mortgage given by the grantor.

2. **RECEIVERS—EFFECT OF APPOINTMENT—RIGHTS OF CREDITORS.**

A receiver appointed for an insolvent corporation in a suit by its creditors is merely the custodian of the court, holding and protecting the property to await its ultimate disposition according as the right may appear. His appointment does not impose any liens upon the property in favor of the plaintiffs, nor affect the priority of liens, nor rights existing against the corporation.

3. **EQUITABLE SET-OFF—EFFECT OF APPOINTMENT OF RECEIVER.**

The appointment of a receiver for an insolvent corporation does not affect the right of a debtor of the corporation to an equitable set-off growing out of the breach of a covenant made by the corporation before the receivership.

4. **SAME—MUTUALITY OF CREDIT—INSOLVENCY OF ONE PARTY.**

The equitable right of set-off is not strictly limited to demands arising out of the same contract or transaction where insolvency exists.

5. **SAME—UNLIQUIDATED DEMANDS.**

That a claim is unliquidated is no objection to its being made the subject of a set-off in equity, where the party against whom it exists is insolvent. Under such circumstances, the court will restrain the enforcement of the demand against which it is to be applied, until the cross demand can be liquidated.

6. **SAME—BREACH OF COVENANT—ACCRUAL OF RIGHT OF ACTION.**

A corporation conveyed to another both real and personal property, by a deed containing covenants of general warranty and of seisin, at the same time leasing to the grantee other property. The grantor afterwards be-

came insolvent, and its receiver obtained a judgment against the grantee for rentals due under the lease. At the time the deed was made, all the property conveyed was subject to a mortgage made by the grantor, which was foreclosed, and the grantee was deprived of the property thereunder after the receiver obtained his judgment. *Held*, that the covenant of seisin as to both real and personal property was broken as soon as made, but as the full damages had not accrued at the time of the action by the receiver, and were not then the subject of a set-off at law, the grantee was entitled to have them set off in equity against the judgment in a subsequent suit brought by the receiver to enforce the same.

Appeal from the Circuit Court of the United States for the District of Kentucky.

This was a bill filed by the appellee, as a judgment creditor of the appellant, the Central Appalachian Company, Limited, to set aside certain alleged fraudulent conveyances of all of its property to the appellant, the International Development Company, and a mortgage thereof by the latter corporation to the appellant, the Corporation Trust Company, ostensibly for the purpose of securing an issue of bonds by the said mortgagor company aggregating \$1,500,000. The judgment debtor, as well as its grantee in the conveyance assailed, filed answers and cross bills substantially identical. The answers admitted that the conveyance by the Appalachian Company to the International Company was not upon any valuable consideration, the purpose being a mere reorganization of the former company, and that the latter, as successor to the former, stood in the shoes of the grantor, and was liable for all of its just debts and liabilities. In respect to the mortgage to the Corporation Trust Company, these answers averred that it had been made with no fraudulent purpose, and only with the object of raising means to discharge the liabilities of the said Appalachian Company, and to carry out the business purposes of the reorganized corporation. The Corporation Trust Company was a corporation of the state of New Jersey, and had no agency within Kentucky. It was made a defendant under an order of the court, directing service upon it in the state of New Jersey. This was done. It neglected to plead within the time it was required to defend, whereupon judgment by default was entered against it. The principal questions to be determined upon this appeal arise upon the cross bills filed by the two answering corporations. These were filed for the purpose of setting off against the judgment in favor of the complainant, Buchanan, a demand for \$60,000, claimed as liquidated damages arising out of a breach of the covenants in a certain conveyance of chattels and real estate theretofore made by the Southern Land Improvement Company to one E. H. Patterson, for the use and benefit of the Central Appalachian Company, Limited. The same cross demand was set up in the answers as a defense to any relief upon the judgment. The cross defendant, Buchanan, excepted to so much of the answers as set out this cross demand as scandalous, and also demurred to the cross bills for want of equity. The court below sustained both the demurrer and the exception. Thereupon amended cross bills were tendered, stating with somewhat more detail the facts upon which the set-off was asserted. The learned trial judge did not regard the difficulties in the way of the assertion of this claim as an equitable set-off as having been removed by the proposed amendments, and therefore declined to allow them to be filed. He also denied a motion made by the Corporation Trust Company to allow it to file an answer, and directed a decree as upon bill and answer to be entered against all the defendants, as prayed by the bill. All of the defendants have appealed.

The averments of the cross bill, as amended and tendered, were substantially as follows: (1) That Buchanan had been appointed receiver, January 3, 1894, by the circuit court of the United States for the district of Kentucky, under a bill filed in said court by Martha G. Merriweather and others, against the said Southern Land Improvement Company; that, by the order appointing him, he was directed to take possession of all the property of the said company, and to collect all of its debts, and for this purpose to bring all necessary suits in his own name or that of the corporation. (2) That the

judgment sought to be enforced in this case was upon a demand for rents which accrued to the said Southern Land Improvement Company under a lease of certain lands to the Central Appalachian Company, said lease bearing date October 13, 1892; that the demand so sued upon "was a demand which accrued to the Southern Land Improvement Company, and to no one else, and the said company was joined with the receiver as a necessary co-plaintiff in the action at law brought on said demand"; that said receiver "proceeded to collect said claim, only because of the fact that he was instructed by the court to collect all demands which were due or might become due to said company." (3) It is then averred that, upon the property thus leased, the said lessor "had certain valuable colliery properties, such as coke ovens and various appliances necessary to a colliery plant, and including the commissary house with the ground upon which it was situated." "These colliery properties," it is averred, "were indispensable to the use of certain coal mines, which were then open and in operation by the Southern Land & Improvement Company." Cross complainant then avers that it made a proposition through "its agent and general manager, E. H. Patterson," to buy these colliery properties, provided it could make a satisfactory lease of the mining privileges of said company upon its lands, and that terms satisfactory were agreed upon, which resulted in the lease of October 13, 1892, mentioned above, and in the purchase and sale of said colliery properties situated upon the leased lands. The conveyance of the purchased property was made at the same time, and bears the date of the lease, and it is averred that both "were indispensable parts of the same transaction." The conveyance aforesaid was made to E. H. Patterson, it being averred that it was so made by direction of Patterson, who conducted the transaction for the Central Appalachian Company; that \$25,000 was paid in cash, and subsequently \$35,000 more. It is averred that the Southern Land & Improvement Company knew that Patterson was buying the property for the Appalachian Company, and that its money was used in paying for it. It is averred that the grantor made the title to Patterson, binding him to convey same to the Appalachian Company, when the latter should acquire title to a certain amount of lands, having no interest in the condition, which was inserted for Patterson's purposes, and to better enable him to compel his principal to receive the titles to certain lands which he was engaged in selling or procuring for it. It is averred that this conveyance was therefore made to said Patterson in trust for the real and known purchaser, and that the seller intended the warranty and covenants of said conveyance "to inure to the benefit of the Central Appalachian Company."

This conveyance is made an exhibit to the cross bill, and the property sold is thus described: "(1) The colliery plant of coke ovens, consisting of one hundred in number, situate upon lands this day leased by the improvement company aforesaid to the Central Appalachian Company, Limited, of Belgium, lying between the junction of the right and left forks of Straight creek, and the present terminus of the Pineville, West Virginia & Tennessee Railroad. (2) All the miners' and operators' houses, being thirty-nine in number, and all other buildings now erected and standing on said leased lands and on either side of the right fork of Straight creek, including carpenter shop, butcher shop, pump house, power house, blacksmith shop, tipple, stables, and coke-oven stables. (3) All the tools and implements, all the tramway cars, tracks' scales, mile scales, machinery, mine railway tracks, and all the property of the improvement company, the first party hereto, now in place and being used by the improvement company in the operation of the mines and coke ovens now conducted by it, excepting only the teams, harness, wagons, and cars of the improvement company. (4) The building known as the 'Commissary Building,' together with the land upon which it stands, being a lot of seventy-five (75) feet front by one hundred (100) feet deep, it being understood that the land upon which the other structure stands is not sold or conveyed." This instrument contains the following condition, namely: "Said property is conveyed on condition that said Patterson will convey same, free of incumbrance or lien by him, to the Central Appalachian Company, Limited, of Belgium, whenever that company shall have received title to seventy-two thousand (72,000) acres of land in Southeastern Kentucky, un-

incumbered, and shall have placed the deed therefor of record, or lodged same for record,"—and concludes with a warranty and covenant in these words: "To have and to hold the said property, together with the rights and things and estate appurtenant thereto herein conveyed to him, the said second party, his heirs and assigns, forever, the said first party hereto warranting the title to the said property by covenant of general warranty; and said first party furthermore covenants that it is seised of a good and lawful and fee-simple title to said property."

December 7, 1893, Patterson conveyed all this property to the said Central Appalachian Company for the nominal consideration of one dollar. The cross bills then aver that, when this conveyance and warranty were so made to said Patterson for the use and benefit of the cross complainant, said property was subject to a mortgage for \$500,000, made by said Southern Land & Improvement Company to the Louisville Trust Company, as trustee; that subsequently a decree foreclosing said mortgage for the satisfaction and payment of said debt was obtained in the said circuit court, and on August 11, 1896, said decree was executed by a sale of all the mortgaged property, including that so sold to cross complainant, and said property was purchased by the National Iron & Coal Company; that this sale was confirmed and deed made to the purchaser October 15, 1896; and that cross complainant has thus lost the property, real as well as personal, and has thereby been damaged to the full extent of the purchase price of \$60,000, with interest. The insolvency of the said Southern Land & Improvement Company is also averred. The prayer is that the amount due upon the judgment in favor of Buchanan, receiver, be credited upon the larger amount due to cross complainant, and that the balance be satisfied out of the funds in the receiver's hands, etc.

Helm, Bruce & Helm, for appellants.

Richards, Baskin & Ronald, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The principal question arising upon this appeal is as to the right of the Central Appalachian Company to set off against the judgment in favor of Buchanan, as receiver of the Southern Land & Improvement Company, the claim in its favor against the Southern Land & Improvement Company arising out of the breach of the covenants of the latter company in its conveyance to E. H. Patterson, of October 13, 1892. As the question arises upon demurrer, the facts stated in the cross bill and the proposed amendments thereof must be taken as confessed. The objections to the cross complainant's asserted right of set-off, which have been urged by counsel for the appellee, are numerous, and will be considered separately.

1. It is said that the covenants breached ran to E. H. Patterson, and not to the Central Appalachian Company. The conveyance to Patterson included both realty and chattels. The covenants extended to the title of the vendor to both classes of property. There were two covenants,—one of general warranty, and one that the vendor was "seised of a good and lawful fee-simple title to said property." That these covenants passed with the land included in the conveyance to the assignee of Patterson, the said Central Appalachian Company, is conceded. To the extent, therefore, that the covenants applied to the land, the Central Appalachian Company was entitled to enforce them. As the

demurrer was general, and went to the whole of the equity of the cross bill; it should for this reason alone have been overruled, unless there were other fatal objections going to the whole equity of the cross bill. But we are of opinion, under the averments of the bill, that the covenants applicable to the chattel property included in the conveyance inured also to the use and benefit of the same corporation. The purchase was made by Patterson for the Central Appalachian Company, and this the vendor knew. The purchase money paid was the money of the real purchaser, and this, too, the vendor knew. The condition that Patterson should convey same to the Central Appalachian Company upon the happening of a condition named actually occurred, and the conveyance was so made. But this mode of taking title, it is averred, was one devised by Patterson to subserve a scheme of his own against his principal. It was one in which the vendor had no interest whatever. These circumstances make the conveyance one for the use and benefit of Patterson's principal,—a principal known to the vendor,—and a court of equity would have regarded him as a naked trustee. A recovery by Patterson upon these facts for a breach of these covenants would inure to his principal. Equity abhors circuity of action, and under such circumstances will permit the beneficiary to avail itself of the benefits of the warranty by way of set-off.

2. It is urged that this right of set-off cannot be asserted against a judgment in favor of a receiver of the warrantor. The record in which Buchanan was appointed receiver is not filed. We must assume that he was appointed under the usual proceeding by creditors against an insolvent business corporation, and that no priority was sought or acquired. This is in accord with the averments of the cross bill touching this appointment, which in substance are that he was appointed for the purpose of holding possession of the assets of the company, and of collecting its debts, and that his suit was for rents, which accrued to the Southern Land & Improvement Company as lessor, under a contract with the Central Appalachian Company as lessee, and that "his recovery was alone in right of that company," and in pursuance of an order that he should "collect all demands which were due or should become due" to said company. Such an appointment does not change the title or impose any lien upon the property in possession of the receiver. He is a mere custodian of the court, holding and protecting the property to await its ultimate disposition by the court, according as the right might appear. No right of priority is ordinarily fixed by such appointment. It cuts off the right to acquire liens, but imposes none by virtue of the step alone. *Railroad Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787; *Union Bank v. Kansas City Bank*, 136 U. S. 223-236, 10 Sup. Ct. 1013; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. 268-278; High, Rec. § 5.

The receiver took the claim of the Southern Land & Improvement Company against the Central Appalachian Company in the plight and condition in which it then was. If it was subject to an equitable set-off in the hands of the Southern Land & Improvement Company, it was subject to the same right of set-off in his hands. This must be so from the well-settled principles in respect to the title and right of such receivers, and from analogy to seizures of choses in action under process

more stringent than that of a receivership. Thus, in *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 596-618, 14 Sup. Ct. 710, a garnishee, after a judgment at law in favor of the garnisher, was permitted by a bill in equity to restrain the garnishing creditor from enforcing payment of the judgment until the amount due upon an unliquidated claim for damages arising from the breach of a contract, in existence when the garnishment proceedings were instituted, could be ascertained and be set off against the defendants' judgment. This was upon the ground, as stated by Mr. Justice Jackson, that "the legal operation and effect of the garnishment proceedings, and of the final order made therein, was only to impound what was legally and equitably due from the garnishee after the adjustment of the claims between the latter and the principal debtor, and place it beyond the control of the debtor and subject to collection for the benefit of the attaching creditor." So, in Kentucky an assignee under a general assignment is not a purchaser for value, and can assert no equity which could not be asserted by the assignor himself. *Bridgford v. Barbour*, 80 Ky. 529; *Bank v. Payne*, 86 Ky. 446-466, 8 S. W. 856.

In *Chenault v. Bush*, 84 Ky. 528, 2 S. W. 160, the right of a debtor to set off a note included within a general assignment by his creditor was held not to have been cut off by the assignment, nor by the appointment of a receiver to take the assigned property, and hold and collect same for the benefit of creditors of the assignor. In considering the effect of the assignment upon the debtors' right of set-off, the Kentucky supreme court, through Judge Bennett, said:

"If the appellant, as receiver, represented assignees of Williams & Stevenson for value, the rule might be different; probably it would be different. Or, if appellee had acquired his right to the debt pleaded by him as a set-off, after the assignment for the benefit of creditors, the rule would be different. But the appellant, as receiver, does not represent assignees for value. The assignees are merely the voluntary representatives of Williams & Stevenson for the benefit of their creditors. The equitable right acquired by these creditors by reason of the assignment consisted in the right to an equal division of the assignor's assets among themselves. These assets are the assets found to be due after deducting all just set-offs, counterclaims, discounts, etc. This balance they are entitled to, and no more. This is all the fund Williams & Stevenson would have to satisfy their creditors, in case they had made no assignment for the benefit of their creditors. Had Williams & Stevenson sued on these notes in place of the receiver, there is no doubt that the appellee could use as a set-off the amount he had paid the bank for Williams & Stevenson on said joint obligation, which would have disabled Williams & Stevenson to that extent to meet the demands of their other creditors. Instead, the voluntary assignees of Williams & Stevenson—rather, the receiver—bring suit on these notes; so, to say that the creditors of Williams & Stevenson, by the voluntary assignment, can compel appellee to pay said notes in full, and then receive only a pro rata of the debt, which he was compelled to pay for Williams & Stevenson, would be to put appellee in a worse position, and the other creditors in a better position, by the failure of Williams & Stevenson and the appointment of assignees."

The right of set-off at law is of statutory origin. But courts of equity, independently of any statute, have from an early day granted relief beyond the terms of such statutes when the particular circumstances have been such as to raise an equity in support of the claim. So, courts of equity of the United States have been peculiarly alert to prevent the defeat of an equitable right of set-off by the interposition

of assignments, receiverships, or statutory liquidations, and to extend the right whenever there appeared any substantial equity in favor of the claim. Thus, in *Scammon v. Kimball*, 92 U. S. 362, a banker was allowed to set off the demand of an insurance company for money deposited, by the amount due on its fire policies issued to and held by him, although the insurance company was bankrupt and in the hands of an assignee.

In *Carr v. Hamilton*, 129 U. S. 252, 9 Sup. Ct. 295, a debt for money loaned and secured by mortgage was allowed to be set off by the equitable value of an endowment policy held by the mortgagor in the mortgagee insurance company, notwithstanding the latter was insolvent, and its assets in the hands of a liquidator, and although the endowment policy had not matured at date of liquidation, Justice Bradley saying:

"Where a holder of a life policy borrows money of his insurer, it will be presumed, *prima facie*, that he does so on the faith of the insurance, and in expectation of possibly meeting his own obligation to the company by that of the company to him, and that the case is one of mutual credit, and entitled to the privilege of compensation or set-off whenever the mutual liquidation of the demands is judicially decreed on the insolvency of the company. The case of *Scammon v. Kimball*, 92 U. S. 362, is in concurrence with this view. It was there held that a banker, having insurance in a company, which was rendered utterly insolvent by the great Chicago fire of 1871, by which the banker's insured property was consumed with the rest, had a right to set up the amount of his insurance against money of the company in his hands on deposit. The insurance was not a debt due at the time of the insolvency. It became due afterwards, when the banker had performed all the conditions required in such cases."

In *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, it was held that the receiver of a national bank, closed by order of the examiner, took the assets in trust for creditors, and subject to all claims and defenses that might have been interposed against the insolvent corporation. So, in *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 596, 14 Sup. Ct. 710, the equitable right of set-off was held not to be defeated by the recovery of a judgment in favor of a garnishing creditor of the complainant, who sought to set off such judgment by an unliquidated demand for damages which accrued after the judgment, but upon a contract then in existence. The insolvency of the creditor against whom the right of set-off was asserted was regarded as a sufficient equity to justify relief.

3. This claim of set-off arises out of the same transaction as the judgment sought to be set off. The one demand is for rents of lands and mineral rights; the other is for breach of covenants in a conveyance of chattels, constituting a colliery property situated upon the leased lands. The two contracts were made the same day, and each was dependent on the other. The colliery properties were needed to exercise the mineral rights in the leased lands. *Stone v. Fargo*, 55 Ill. 71; *Railroad Co. v. Griggs*, 12 Mich. 45. In *Stone v. Fargo*, supra, a claim for damages arising from breach of a bond given by a vendor of land to the vendee, conditioned to hold him harmless against liability upon certain purchase-money notes outstanding, which had been given by the vendee to a third person as purchase money of the same land, was set off in equity against purchase-money notes due the vendor. In *Railroad Co. v. Griggs*, supra, a bill in equity was sustained, and complain-

ant allowed to set off purchase-money notes by the amount of two mortgages paid by the purchaser which were a lien on the land, there being a covenant against incumbrances, and the vendor insolvent. It would seem, however, that, under the law of Kentucky, there was a statutory right of set-off existing in respect to all demands arising out of contract, regardless of mutuality of credit. Civ. Code Ky. § 96; *Shropshire v. Conrad*, 2 Metc. 143; *Forbes v. Cooper*, 88 Ky. 285, 11 S. W. 24. Neither, would it seem, is the equitable right of set-off limited to credits strictly mutual, if insolvency exists. *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, supra.

4. That the claim of the appellant, the Central Appalachian Company, is unliquidated, is no objection in a court of equity, if insolvency exists. Under such circumstances, the court will restrain the enforcement of the demand against which the set-off is to be applied until the cross demand can be liquidated. *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, supra. So, in Kentucky,—*Forbes v. Cooper*, 88 Ky. 285, 11 S. W. 24.

5. It is said that the claim asserted as a set-off had not arisen when the receiver was appointed, nor when he recovered his judgment. The contract under which the set-off arose was in existence when the receiver was appointed, and the warrantor in that contract was then insolvent. Under the case, so often cited, of *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 596, 14 Sup. Ct. 710, this fact was in itself enough. But a right of action for breach of one of the covenants had arisen when the receiver was appointed. The conveyance to Patterson included both real and personal property. There was a covenant of general warranty, and a covenant of seisin. Both the real and personal property was then incumbered with a prodigious mortgage, which, since the receiver's judgment, has been enforced, and the covenantee has been thereby deprived of the property so conveyed. The covenant of seisin as to the real estate was therefore broken so soon as made. The covenant of general warranty has since been broken by the grantee's ouster from the property by the mortgage foreclosure decree. The vendor of personal property in possession impliedly warrants the title by the act of sale. His sale is an assertion of title. This is elementary. This implied warranty of title is held in Kentucky to be broken as soon as made if the title was defective, and a right of action at once arises. *Payne v. Rodden*, 4 Bibb, 304, 305; *Scott v. Scott's Adm'r*, 2 A. K. Marsh. 217. So it is held in Tennessee (*Word v. Cavin*, 1 Head, 506); and in Massachusetts (*Perkins v. Whelan*, 116 Mass. 542). This implied warranty the Kentucky courts assimilate to an express covenant of seisin in a conveyance of real estate. *Tipton v. Triplett*, 1 Metc. 570; *Chancellor v. Wiggins*, 4 B. Mon. 201; *Scott v. Scott's Adm'r*, supra.

But if the covenant of warranty of title is express, and not implied, the same cases hold that an action will not lie until a recovery of the property can be averred and proven. In this conveyance we have both a general warranty of title and a covenant of seisin. The vendor of the chattels expressly covenanted that it was "seised of a good and lawful fee-simple title to said property." The covenantor had no such fee-simple or other good and lawful title. This covenant was therefore

broken when made. This is by analogy to the same covenant in deeds of real estate, and we see no reason why the rule in respect to such a covenant in a conveyance of realty shall not be applied to a like covenant in a conveyance of chattels. Thus, a right of action for breach of this covenant of seisin had arisen when the receiver was appointed, and when he recovered his judgment. The damage had at neither date fully accrued. The mortgage covered this and other property. The latter might discharge the burden. The event has proven that it was insufficient. The fact remains, though, that, when the receiver recovered his judgment, the full damage had not accrued, and could not have been made to appear. These damages were unliquidated. They were therefore not the subject of set-off at law, but may be set off in equity when insolvency or some other equity exists in support of the right, as in *North Chicago Rolling-Mill Co. v. St. Louis Ore & Steel Co.*, supra.

In *Kentucky*, unliquidated damages were not at law the subject of set-off. *Shropshire v. Conrad*, 2 Metc. 143; *Taylor v. Stowell*, 4 Metc. 175; *Williams v. Gilchrist*, 3 Bibb, 49. But it was held that, if the plaintiff be insolvent or a nonresident, any claim for unliquidated damages arising out of contract might be set off. *Forbes v. Cooper*, 88 Ky. 285, 11 S. W. 24. The distinction between courts of law and equity is not maintained in *Kentucky*, and relief is administered according to principles of law or equity, as the facts demand, and upon the same pleading. Thus, no bill in equity was needed to obtain the benefits of the equitable doctrine of set-offs; and the set-off was allowed in *Forbes v. Cooper*, supra, upon equitable principles, and not because, at law, a claim for unliquidated damages was the subject of set-off. It is clear, therefore, from the foregoing considerations, that the right to apply to a court of equity to stay the enforcement of the judgment at law against the appellant is not defeated because the damages had in part accrued by reason of the breach of the covenant of seisin at the time the suit at law was begun.

It was observed by the master of the rolls in *Jeffs v. Wood*, 2 P. Wms. 129, that:

"It is against conscience that A. should be demanding a debt against B., to whom he is indebted in a larger sum, and would avoid paying"; and that "in these cases equity will take hold of a very slight thing to do both parties right."

In *Carr v. Hamilton*, 129 U. S. 255, 9 Sup. Ct. 295, Justice Bradley said that:

"Natural justice and equity would seem to dictate that the demands of parties mutually indebted should be set off against each other, and that the balance only should be considered as due."

This natural justice and equity may be asserted in many cases after judgment upon one of the debts; and one of these cases is where the party against whom it is asserted is insolvent, and there was no culpable negligence in failing to rely upon it as a legal set-off. *Railroad Co. v. Greer*, 87 Tenn. 698, 11 S. W. 931, and cases cited.

6. The Corporation Trust Company was properly brought into court by service of the subpoena upon its assistant treasurer in its general office in New Jersey. The return of the serving marshal, together with his affidavit as to the usual mode of serving process upon its assistant

treasurer by direction of the superior officers of the corporation, is satisfactory evidence that this officer was designated by the corporation as the proper officer to make service upon. The delay in making defense is not explained. No abuse of the sound discretion of the circuit court is shown in refusing to set aside the decree pro confesso. But, inasmuch as the defense of a set-off set up by the cross bills of the other two appellants will necessarily inure to the benefit of the Corporation Trust Company, the final decree as to it, as well as the other appellants, will be set aside and reversed. The decree pro confesso as to the Corporation Trust Company will not be set aside, nor any answer allowed; but that company will, on final decree, be given the benefit of the defenses made by the Central Appalachian Company. The case will be remanded, the demurrers overruled, and the cause proceeded with in accord with the opinion of this court.

MANHATTAN LIFE INS. CO. v. O'NEIL.

(Circuit Court of Appeals, Third Circuit. November 28, 1898.)

Nos. 14 and 15, September Term, 1898.

EVIDENCE—CONSIDERATION STATED IN DEED AS ADMISSION OF VALUE—REBUTTAL TESTIMONY.

A plaintiff in ejectment has the right to rely in the first instance upon the consideration stated in defendant's deed, as an admission of the value of the property; and where he offers evidence to show that defendant paid much less than the sum stated, to impeach the good faith of defendant's purchase, which is met by evidence that the value of the land is less, he is entitled to introduce evidence on the question of value in rebuttal.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

These were actions in ejectment by the Manhattan Life Insurance Company against Edward O'Neil. There were judgments for defendant, and plaintiff brings error.

M. A. Woodward, for plaintiff in error.

Thomas Patterson, for defendant in error.

Before DALLAS, Circuit Judge, and BUTLER and BRADFORD, District Judges.

BUTLER, District Judge. These cases (actions of ejectment for lands in Allegheny county) were tried together. The plaintiff's title rests on marshal's deeds, made in pursuance of sales under a judgment against James McKown; while the defendant's rests on deeds from McKown himself, of earlier date. The plaintiff attacked the latter as fraudulent, alleging that they were made when McKown was insolvent, without adequate consideration, to cheat his creditors; and that O'Neil, who is his brother-in-law, was a party to the fraud. The consideration stated to have been paid is \$14,000—\$7,000 for each property. Treating the statement as sufficient prima facie evidence of value, the plaintiff produced testimony that the price paid was \$2,000—being an indebtedness of McKown to O'Neil—and a liability incurred by the

latter as security for the former, on which nothing appears to have been paid. The defendant then exhibited testimony to show that the price stated in the deeds is much too high. In answer the plaintiff offered testimony to prove that the estimates of the defendant's witnesses were too low, and that the value specified in the deeds was not too great. To this offer the plaintiff objected, and the court sustained the objection. This action of the court, and numerous exceptions to the charge, form the basis of the several assignments of error. As respects the exceptions to the charge it is sufficient to say that none of them are sustained. The plaintiff presented numerous points, relating to matters of fact, which could not be affirmed (without qualification at least). The one important question in the case was: Does the evidence prove the alleged fraud? This was for the jury, and was fairly submitted.

In rejecting the plaintiff's offer of testimony, we think the court was wrong. That the testimony proposed was relevant and important cannot be doubted. It went to the marrow of the question involved—the adequacy of price, paid for the property. The objection urged was that the offer came too late. It seems clear to us that it did not, however; that it came in its proper place and order. The plaintiff was fully justified in relying, at the outset, on the sum stated in the deeds to have been paid. This was a distinct admission of value, quite sufficient for the plaintiff's purpose, until attacked. The statement was the defendant's, as clearly as if he had executed the deeds, instead of accepting and holding under them. The plaintiff was not required to anticipate that he would attack the truth of the statement, but might properly wait until he did, and then answer him.

The judgment must be reversed.

WARRINGTON v. BALL.

(Circuit Court of Appeals, Third Circuit. December 2, 1898.)

No. 37, September Term, 1898.

1. CORPORATIONS — SUIT AGAINST STOCKHOLDER IN KANSAS CORPORATION—DEFENSES.

It having been held by the supreme court of Kansas that a suit by a judgment creditor of a corporation of that state against a stockholder to enforce the statutory liability of the defendant is founded upon the plaintiff's judgment against the corporation, and that the defendant may impeach such judgment for fraud or want of jurisdiction (*Ball v. Reese*, 50 Pac. 875, 58 Kan. 614), an allegation by a defendant that the judgment sued on was fraudulent and collusive states a defense to such an action in any state, the faith and credit to be given such judgment in other states being that to which it is entitled in Kansas.

2. SAME—IMPEACHING JUDGMENT SUED ON—FRAUD AS A DEFENSE.

Fraud being an available defense at law, a stockholder sued upon a judgment against the corporation, to which he was not a party, may allege fraud in the procuring of such judgment as a defense, and is not required to bring a suit in equity to set it aside. Such a defense is no more a collateral attack upon the judgment than a suit in equity would be.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action by William E. Ball against Anna M. Warrington, a citizen of Pennsylvania, to enforce an alleged liability of defendant as a stockholder in a Kansas corporation. The circuit court held the affidavit of defense insufficient, and rendered judgment for plaintiff, from which defendant brings error.

E. Spencer Miller, for plaintiff in error.

S. Morris Waln and A. E. Bannard, for defendant in error.

Before ACHESON, Circuit Judge, and BUTLER and BRADFORD, District Judges.

BUTLER, District Judge. The suit is founded on a judgment obtained in Kansas, against the Kansas Saving Bank, chartered under the laws of that state, and located there. The constitution of Kansas (article 12, § 2), provides that "dues from corporations shall be secured by individual liability of stockholders, to an additional amount equal to the stock owned by each stockholder," and a statute of the state (Gen. St. 1889, par. 1192) provides (when a creditor has obtained judgment against the corporation) as follows:

"If execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged, and upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

Several defenses are set up, one of which is that the judgment sued upon is fraudulent; the allegation being, substantially, that it was obtained by collusion between the plaintiff and the representatives of the bank; that the bank was not indebted to the plaintiff, the certificate of deposit on which he sued having been issued for money furnished to the cashier personally; and that the object of the collusion was to avoid a defense, enable the plaintiff to obtain judgment by default, and pursue the defendant and other stockholders. The circuit court entered judgment for the plaintiff—holding the affidavit of defense to be insufficient.

It is not necessary to examine the several defenses averred. If one of them is sufficient the judgment must be reversed, and the case sent back for trial. If questions shall thereafter exist respecting others, they may be considered in the light of the facts, ascertained by the trial. We think the judgment was erroneously entered. If the averment of fraud was confined to the certificate of deposit, as the learned judge of the circuit court seems to have believed, a different question would be presented. The right to sue is, in terms, based on the judgment against the corporation; and these terms having received a literal interpretation by the supreme court of Kansas, in *Ball v. Reese*, 58 Kan. 614 [50 Pac. 875], we must follow it, and treat the judgment alone, as the foundation of the suit. The fraud averred, however, as we have seen, involves the

judgment itself. That it constitutes a valid defense we cannot doubt. Fraud, generally, vitiates whatever it touches—whether a contract, a deed, or a record. It is unnecessary to consider questions presented by such a defense when set up to suits on foreign judgments, against the defendant therein. The only question before us arises under the clause of the constitution of the United States which provides that “full faith and credit shall be given in each state to public acts, records, and judicial proceedings of every other state.” This judgment must be given the same credit here that it is entitled to in Kansas. What credit is it entitled to there? In the absence of decision by the supreme court of that state, the question might possibly present difficulties. We do not doubt however that we would hold it liable to invalidation by proof of the fraud here averred. Any other view would render the statutory remedy against stockholders too inequitable to justify its enforcement outside the state. Indeed the courts of many of the states have declined to enforce it under any circumstances. See *Cushing v. Perot*, 175 Pa. St. 66 [34 Atl. 447]; *Marshall v. Sherman*, 148 N. Y. 9 [42 N. E. 419]; *Fowler v. Lamson*, 146 Ill. 472 [34 N. E. 932]; *Tuttle v. Bank*, 161 Ill. 497 [44 N. E. 984]. To bind one by a judgment to which he is not a party, as provided for by the statute, is barely tolerable. To bind him by such a judgment obtained by fraudulent collusion (as here averred) would be intolerable. We are saved the necessity, however, of considering the subject by the decision in *Ball v. Reese*, supra. The credit to which such judgments are entitled in Kansas, was there directly involved; and while the court (contrary to its former declarations) held the judgment to be conclusive of all questions *except fraud* and want of jurisdiction, it as distinctly held that it may be impeached and avoided for these causes. The court is emphatic in so declaring; and places fraud and want of jurisdiction in the same category. This determination of the question is conclusive. There is no force in the contention that the impeachment cannot be made collaterally. The court in *Ball v. Reese* distinctly says it can, and cites the following language from 3 *Thomp. Corp.* p. 392, § 3:

“Although stockholders cannot appear and contest the merits of the action against the corporation, yet when a judgment is rendered against the corporation it establishes as conclusively as any judgment can establish the matter in litigation, the liability of the corporation to pay the debt. Like any judgment, it may be impeached for fraud or for want of jurisdiction by a party entitled to question it; but it cannot be assailed collaterally by a stockholder for any other cause when sought to be charged in respect of it.”

The defendant cannot indeed impeach the judgment in any other way than collaterally. She is not a party to it; and it is valid as between the plaintiff and the bank, so long as the latter acquiesces. She could not therefore be heard in an application to open it. A proceeding in equity to declare it void as to her, would be as clearly a collateral impeachment as that here proposed. The suggestion that she should go to Kansas to seek equitable aid, has no support in reason or authority. She might have such aid wherever the plaintiff is found. Having come here and sought the assistance of our courts to enforce the judgment, she might appeal to equity here against the consequences of the fraud, as effectually as she could in Kansas. She is not re-

quired however to seek the protection of equity anywhere. Fraud is an available defense at law, and she may therefore set it up in answer to the suit.

The judgment must be reversed.

CINCINNATI, N. O. & T. P. RY. CO. v. N. K. FAIRBANKS & CO.

(Circuit Court of Appeals, Sixth Circuit. November 28, 1898.)

No. 601.

1. CARRIERS OF GOODS—CONTRACT OF CARRIAGE—LIABILITY OF CONNECTING LINES.

A carrier receiving goods billed for carriage beyond its own line is presumptively bound only to carry such goods to the end of its own line on their route, and to safely deliver them to the connecting line, to be forwarded; and it is not liable for loss or damage occurring after such delivery, except by special contract.

2. SAME—CONSTRUCTION OF BILL OF LADING.

A bill of lading for goods to be carried over several connecting lines, by which the initial carrier undertakes, for itself and the connecting carriers named, "severally and not jointly," that each carrier on the line shall safely carry and deliver the goods received to the next succeeding carrier, until they reach their destination, expressly stipulating that the liability of each as to the goods destined beyond its own line shall terminate on their delivery to the next succeeding carrier, and that in case of loss or damage to the goods the carrier in whose actual custody they are at the time of such loss or damage shall alone be responsible therefor, although it names a through rate, constitutes a several contract between the owner of the goods and each carrier accepting them thereunder in the course of shipment, and renders any carrier in whose custody they are at the time of loss or damage liable directly to such owner therefor, as a carrier, and not merely for negligence as agent of the initial carrier.

3. SAME—RAILROADS—DEFECTIVE CARS.

It is the duty of a railroad to furnish fit and suitable cars for the carriage of goods, and it cannot avoid responsibility for loss or damage caused by defective cars by devolving upon the shipper the duty of inspecting or selecting the cars in which his goods are to be shipped.

4. SAME—OWNERSHIP OF CARS USED.

The responsibility of a railroad carrier is the same whether the goods are carried in its own cars or those of another.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

This is an action by N. K. Fairbanks & Co. against the Cincinnati, New Orleans & Texas Pacific Railway Company to recover for goods lost in shipment. There was a judgment for the plaintiff, and defendant brings error.

Harmon, Colston, Goldsmith & Hoadly, for plaintiff in error.

Robert Ramsey, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge. This is an action against a railway company to recover the value of a shipment of cotton-seed oil lost while in course of transportation over the railway of the plaintiff in error.

There was a direction to find for the defendant in error. It is now said that this instruction was erroneous, and that plaintiff in error was not liable as an insurer against all accident and loss due to human agency, but only for negligence, and that there was no evidence of negligence. It may be conceded that, if the plaintiff in error is not liable as a common carrier, but only for negligence, the judgment must be reversed.

1. It is said that these goods were shipped under a through bill of lading issued by another carrier, by which it undertook to safely deliver the goods at their destination, and that plaintiff in error was an intermediate carrier, carrying the goods only as agent for the initial carrier, and having no contractual relations with the owner, and liable only, if at all, for a loss through negligence. This contention is not sustained by the facts. This oil was contained in four cars, called "tank cars": cars peculiarly adapted to the shipment of oil in bulk. It was received at Atlanta, Ga., the place of shipment, by the East Tennessee, Virginia & Georgia Railway Company, consigned to Chicago, Ill. The initial carrier owned and operated a line of railroad, extending in the direction of Chicago, only between Atlanta and Chattanooga, Tenn. At the latter point the line of railway operated by plaintiff in error began, and continued the route in the direction of Chicago. The first carrier issued a through bill of lading for each of said tank cars. Each bill was entitled:

"Shippers are requested to read this contract.

"East Tennessee, Virginia and Georgia Railway Company and Connections.

"Through Bill of Lading.

"The right to compress cotton reserved in this bill of lading. This receipt to be presented without alteration or erasure."

The following are those parts of the printed bill which have most bearing upon its construction in the matter now under consideration:

"Atlanta, Ga., 5/4, 1889.

"Received by the East Tennessee, Virginia and Georgia Railway Company, of Southern Cotton-Oil Company, under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, in apparent good order and condition; contents and value unknown.

"Consigned to N. K. Fairbanks & Co., at Chicago, Ill. To be transported by the East Tennessee, Virginia and Georgia Railway to —; thence by connecting rail or other carrier, via —, until they reach the station or wharf nearest their ultimate destination. If their ultimate destination be beyond the point for which rates are named, they may, by the connecting carrier nearest such ultimate destination, be delivered to any other carrier, to be transported to such ultimate point; and the carrier so selected shall be regarded exclusively as the agent of the owner or consignee. Each carrier shall be bound (subject to limitations and exceptions contained in this contract) to deliver said goods in the same order and condition as that in which it received them; and the ultimate carrier to deliver them at its station or wharf to his consignee or his assigns, if called for by him or them, as in this contract provided,—he or they paying freight and charges thereon, and average, if any. It is mutually agreed, in consideration of the rates herein guarantied, that the liability of each carrier, as to goods destined beyond its own route, shall be terminated by proper delivery of them to the next succeeding carrier. * * * The several carriers shall have a lien upon the goods specified in this bill of lading for all arrearages of freight and charges due by the same owners or consignees on other goods. In case of loss, detriment, or damage to the goods, or delay in the transportation thereof, imposing any liability hereunder, the carrier in whose actual custody they were at the

time of such loss, damage, detriment or delay shall alone be responsible therefor. The receipt of any carrier for the goods shall be prima facie evidence of the condition in which he received them, in a suit against any other carrier. * * * This bill of lading is signed for the different carriers who may be engaged in the transportation, severally, not jointly; and each of them is to be bound by, and have the benefit of, all the provisions thereof, as if signed by it, the shipper, owner, and consignee. The acceptance of this bill of lading is an agreement on the part of the shipper, owner, and consignee of the goods, to be bound by all of its stipulations, exceptions, and conditions, as fully as if they were all signed by such shipper, owner, and consignee. This contract is executed and accomplished, and the liability of the company as common carrier thereunder terminates, on the arrival of the goods or property at the wharf, station, or depot to which this bill of lading contracts to deliver and the carrier will be responsible thereafter only as warehouseman. This bill of lading shall have the effect of a special contract not liable to be modified by a receipt from or of an intermediate carrier."

All of these bills are signed by "M. Taylor, Agent," and conclude with a blank form, filled in in part, as follows:

Cents Per One Hundred Pounds.						
If Class 1	If Class 2	If Class 3	If Class 4	If Class 5	If Class 6	If Special
		35				

Subject to differences in classification of connecting carriers.

Charges advanced \$.....

In witness whereof bills of lading, all of this tenor and date, have been signed, one whereof being accomplished, the others to stand void.

Rates from Atlanta, Ga., to Chicago, Ill.

Names by.....Agent.

Weights, rates, and classification subject to correction.

Marks and Numbers.	No. Pk'gs.	Description of Articles.	Weight.
A. C. O. Co. 7027.		One tank C. S. Oil..... Via E. T. V. & G., C. N. O. & T. P., C. H. & D., L. N. A. & C. R. R.	34,350 lbs.

M. Taylor, Agent.

To support the argument that these contracts should be construed as engagements by the initial carrier for the safe carriage of these goods to their ultimate destination, although beyond the end of its own line, counsel have cited *Railroad Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838, as peculiarly applicable; being a determination of a question much the same by the supreme court of Georgia, the state within which these contracts were made. They have also cited, as in harmony with the law as declared by the Georgia court, the cases of *Gordon v. Railway Co.*, 34 U. C. Q. B. 224; *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69, 28 S. W. 965; *Cutts v. Brainerd*, 42 Vt. 566; and *Railway Co. v. Merriman*, 52 Ill. 123. Most, if not all, of these cases follow the rule of *Muschamp v. Railway Co.*, 8 Mees. & W. 421, that the mere acceptance of goods implies an agreement to carry them to their final destination, whether beyond the line of the carrier or not. That rule has not been followed by the majority of the courts of this country, and was expressly repudiated by the supreme court of the United States in

Myrick v. Railroad Co., 107 U. S. 102, 106, 107, 1 Sup. Ct. 425. The rule applicable was thus stated by the court:

"A railroad company is a carrier of goods for the public, and as such is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line,—the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the states. As was said in *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318-324: 'It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of its own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction.' This doctrine was approved in the subsequent case of *Railroad Co. v. Pratt*, 22 Wall. 123, although the contract there was to carry through the whole route. Such a contract may, of course, be made with any one of different connecting lines. There is no objection in law to a contract of the kind, with its attendant liabilities. See, also, *Insurance Co. v. Railroad Co.*, 104 U. S. 146. The general doctrine, then, as to transportation by connecting lines, approved by this court and also by a majority of the state courts, amounts to this: That each road is only bound, in the absence of a special contract, to safely carry over its own route and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."

Looking to all parts of the contracts here involved, we can reach no other conclusion than that the initial carrier undertook, for itself and its connecting lines in the route, "severally and not jointly," that each would carry safely to the point of junction with the next succeeding carrier, and then deliver to it, and that each should be liable exclusively for any loss while in its custody. The blanks in the first clause of the contract set out above, showing the point to which the East Tennessee, Virginia & Georgia Railway Company undertook to carry, and the connecting carrier to whom it undertook to deliver, were possibly not filled in for want of space. But at the foot of the contract, under the larger space for "Description of Articles," the route and names of connecting carriers are stated. This, in connection with the clear expression of an intention to engage only for the safe carriage over its own line, clears up any doubt which might arise from the giving of a through rate upon goods destined to a point beyond its own line. In this day of advanced methods in the carriage of goods, very little significance can be attached to the mere giving of a through rate for a shipment necessarily passing over the line of more than one carrier. The presumption is rather that it undertook to contract for itself and the connecting carrier, severally and not jointly. This purpose is very clear upon the bills issued in respect to this shipment. The plaintiff in error has not repudiated the contract made for it by the initial carrier. On the contrary, it has

sought to avail itself of a modification of its common-law liability as an insurer by an insistence upon nonliability for "the breaking of an axle," as an "accident to machinery," within the meaning of the provision exempting the carrier from loss due to the "breaking of machinery" without negligence. This defense we passed upon under an appeal disposed of at a former term of this court. *Fairbanks v. Railroad Co.*, 47 U. S. App. 744, 26 C. C. A. 402, and 81 Fed. 289. Our conclusion upon this point is that there is privity of contract between plaintiff in error and the owner of the goods lost, and that it is liable as a common carrier, unless relieved by some other matter.

2. It is next urged that the plaintiff in error was relieved from the rigid rule of the common law which makes it an insurer against any loss not due to an act of God or the public enemy, by reason of the fact that this loss was due to a defective axle in one of the tank cars in which this oil was being carried, and that that car, as well as the others in which this oil was being transported, was "selected" by the shipper, the Southern Cotton-Seed Oil Company. Precisely what is implied by the term "selected" is not clear. Certain it is that there is no evidence that these tank cars were ever inspected or approved by the shipper. Nor is it to be conceded that the carrier could avoid responsibility as a carrier by devolving upon the shipper the duty of inspecting or selecting the cars in which his goods are to be shipped. The duty of the carrier is to furnish fit and suitable cars for the carriage of goods. *Railroad Co. v. Dies*, 91 Tenn. 177, 18 S. W. 266; *Railroad Co. v. Davis*, 159 Ill. 53, 42 N. E. 382. But this question is not raised by the evidence in this record. These tank cars did not belong to the shipper. They were owned by a company called the "American Cotton-Seed Oil Company." Neither were they hired by the shipper, or in any sense furnished by it. The evidence is meager upon this question. It is only shown that these and other like cars were owned by the American Cotton-Seed Oil Company, and that that company furnished them to railroad companies, charging the usual mileage rate allowed for foreign cars. It is shown that these cars were "delivered to" the plaintiff in error, at Cincinnati, April 15, 1889, and that that company "delivered" them to the East Tennessee, Virginia & Georgia Railway Company, at Chattanooga, April 21, 1889, and that the latter company "returned" the cars to the plaintiff in error, "loaded," at Chattanooga, May 5, 1889, and that the plaintiff in error paid the owner of the cars three-fourths of a cent per mile "for the use of three cars running over its road, transporting this oil." This is all the proof discoverable which bears upon this claim that the shipper "selected" these cars. We see nothing in the facts which distinguish this case from the ordinary use by one company of the cars of another. The responsibility of the carrier is the same, whether the goods be carried in its own cars or those of another. Judgment affirmed.

OLAY v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. October 4, 1898.)

No. 608.

COSTS—SHOWING OF POVERTY—PLAINTIFF SUING IN REPRESENTATIVE CAPACITY.

The payment of the ordinary costs of proceedings in error in the circuit court of appeals cannot be dispensed with on a showing merely that the plaintiff in error, who is suing in a representative capacity, has no funds in such capacity, but it must also appear that the beneficiaries in whose interest the suit is maintained are unable to pay the required costs.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

This cause comes on to be heard upon a petition by the plaintiff in error of the tenor following: "Your petitioner, plaintiff in error in the above cause, respectfully shows that this suit was brought originally in the law court at Johnson City, Tenn., and was, on petition of the defendant, removed to the United States circuit court at Knoxville, Tenn. It is an action for damages for personal injuries resulting in death. Plaintiff's intestate left surviving her a father, brother, and sister. While the suit was pending, the father died. The trial judge held, upon the hearing of the cause, that the suit abated with his death. The case was a good one upon the merits, as petitioner verily believes, and the only question for trial in this court is whether there is error in the judgment of the trial judge in his holding referred to above. Plaintiff's intestate left no estate of any character, and plaintiff has nothing to pay the docketing fee and the fee for printing the record in this court. The transcript of the record in the cause has been made, and is now in the hands of the clerk of this court. Petitioner therefore prays that the filing of the docket fees and the printing of the record be dispensed with in this cause."

J. B. Cox and Isaac Harr, for plaintiff in error.

Jourlmon, Welcker & Hudson, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

PER CURIAM. This petition must be denied, because it does not appear therefrom that the persons who claim to be the beneficiaries and the real parties in interest in the cause of action are paupers, and unable to pay the ordinary costs of the proceeding in error. It is not sufficient, in a suit brought by one in a representative capacity, as is the case with such suits under the Tennessee statutes, to make it appear that in his representative capacity he has no funds with which to prosecute the suit. It must also appear that those persons who will enjoy the fruit of the litigation, and who are the real parties in interest, are also in such a condition of poverty that they cannot pay the costs of that which is done for their benefit. The application is therefore denied, without prejudice to its renewal, upon an affidavit which shall remedy the defect herein pointed out, within 30 days.

BRYAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 10, 1898.)

No. 443.

1. POSTMASTER'S BOND—LIABILITY FOR ACTS OF CLERK.

A postmaster's bond, conditioned for the payment of all moneys "that shall come into his hands * * * from money orders issued by him," covers moneys received and embezzled by a money-order clerk.

2. SAME.

The liability on a postmaster's bond for the acts of a clerk is not affected by the fact that the clerk is appointed under the civil service act, and not by the postmaster.

In Error to the Circuit Court of the United States for the Northern District of California.

John T. Carey and Page, McCutcheon & Eells, for plaintiffs in error.

Samuel Knight, for the United States.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This was an action by the United States to recover from William J. Bryan and others, the plaintiffs in error, the sum of \$9,399.88 and interest from April 30, 1892, on account of their alleged liability as principal and sureties upon an official bond given by Bryan for the faithful performance of his duties as postmaster of the city of San Francisco for a term which commenced July 14, 1886, and ended June 30, 1890. By the terms of this bond the plaintiffs in error became jointly and severally bound to the United States that Bryan, the principal therein, would pay the balance of all moneys that might "come into his hands from postage collected * * * or money orders issued by him," and would also "faithfully do and perform all of the duties and obligations imposed upon or required of him by law or the rules and regulations of the department in connection with the money-order business." The complaint alleges that Bryan, in his official capacity as postmaster, received the sum of money demanded in this action in the transaction of the money-order business of his office, and neglected to account for and pay the same over to the United States. The answer in one paragraph contains a denial of the averment that Bryan did not properly account for and pay the balance of all moneys that came into his hands on money-order account in the post office at San Francisco, but this denial is qualified by an admission that there was due to the United States on such account, on June 30, 1890, the sum sued for, and that the same has not been paid; and it is alleged as a defense to this action that these moneys were embezzled by one James S. Kennedy, a clerk in charge of the money-order accounts and money-order funds of the post office at the city of San Francisco, during the period of time covered by the bond; that Kennedy was not appointed by Bryan, but held such office of clerk under the civil service laws of the United States, and the rules and regulations adopted in pursuance thereof, governing the tenure of office of clerks of that class, and that

the money so embezzled by Kennedy was lost to the United States without the fault or negligence of said William J. Bryan. The circuit court sustained a demurrer to this answer, and thereupon gave judgment for the plaintiff for the amount demanded in the complaint. 82 Fed. 290. This ruling of the court upon the demurrer is assigned as error.

It is apparent from the foregoing statement that the only question which is here presented for decision is this: Do the facts alleged in the answer excuse the principal in the bond from accounting to the United States for the money-order funds admitted to have been received at the post office at San Francisco while such principal was the postmaster, and during the term for which such bond was given? To this question a negative answer must be given. The postmaster at a money-order post office is the official custodian of all money received on account of money orders issued therefrom, and as such custodian it is his duty to account to the government for the same; and, in view of this fact, section 3834 of the Revised Statutes requires that the bond of the postmaster at a money-order post office "shall contain an additional condition for the faithful performance of all duties and obligations in connection with the money-order business." The condition above quoted from the bond sued on is that the principal therein will pay the balance of all moneys that shall "come into his hands from postage collected * * * or money orders issued by him." The words "come into his hands," as here used, have the same meaning as the phrase, "come into his official custody," and the true construction of this condition of the bond is that the principal, Bryan, would account for and pay over the balance of all such moneys as should come into his official custody as postmaster at San Francisco. The money which was received by Kennedy, the postal clerk in charge of the money-order business in that office, was thereby, in contemplation of law, received into the official custody of the postmaster; and the fact alleged in the answer that such money was embezzled by Kennedy constitutes no defense to this action. The cases sustaining this conclusion are so numerous that no extended discussion of the question is necessary. *U. S. v. Prescott*, 3 How. 578; *U. S. v. Morgan*, 11 How. 154; *U. S. v. Keebler*, 9 Wall. 83; *Boyden v. U. S.*, 13 Wall. 17; *U. S. v. Thomas*, 15 Wall. 337; *U. S. v. Zabriskie*, 87 Fed. 714; *Bosbyshell v. U. S.*, 23 C. C. A. 581, 77 Fed. 944. The facts that the clerk who embezzled the moneys sued for was not appointed by the principal in the bond, and that the tenure of office of such clerk was held under the civil service act of January 16, 1883 (22 Stat. 403), does not affect the obligation of the bond, nor render inapplicable the rule laid down in the cases above cited. The money received by this clerk on account of money orders issued was constructively in the official custody of the principal in the bond, and it was his duty to exercise official supervision over such clerk, and to see that the money so received by his subordinate was faithfully accounted for. The judgment is affirmed.

In re GUTWILLIG (HAHLO et al., Petitioners).

(District Court, S. D. New York. November 28, 1898.)

BANKRUPTCY—ACT OF 1898—VOLUNTARY ASSIGNMENTS FOR CREDITORS VOIDABLE WITHIN FOUR MONTHS.

Voluntary general assignments for the benefit of creditors made in conformity with the laws of the state of New York, though said laws are not treated as "insolvent laws" within the meaning of the last paragraph of the act of 1898, are voidable by the trustee of the debtor in bankruptcy if made within four months of the adjudication, because (1) incompatible with the purpose and policy of the bankrupt law, and the rights of creditors thereunder to the appointment of the trustee and the supervision of the assets in bankruptcy; (2) because in fraud of creditors within section 70 of the act, as the assignment deprives creditors of the important advantages secured to them under the act of 1898; and (3) because if not voidable the clause of section 3, making such an assignment ipso facto "an act of bankruptcy," would be practically nullified, and rendered of no use to creditors.

In Bankruptcy. On motion to restrain an assignee for benefit of creditors from disposing of the bankrupt's estate.

Epstein Bros. (Alexander Blumenstiel and Stillman F. Kneeland, of counsel), for petitioners.

George Fielder, for assignee.

BROWN, District Judge. The affidavit on which this order to show cause was heard states, that Henry Gutwillig on the 9th day of November, 1898, made a general assignment of all his property to William Leete Stone, Jr., for the benefit of his creditors, and that the assignee has taken possession of the property; that on November 10th the petitioning creditors filed a petition in this court that said Gutwillig be adjudged a bankrupt, and praying that the assignee be restrained from disposing of the assigned property or its proceeds until the adjudication upon the petition. Sections 3, 4 and 59 of the act of July 1, 1898, declare such an assignment to be itself "an act of bankruptcy," and authorize creditors within four months thereafter to file a petition in bankruptcy against the insolvent debtor. Under sections 18 and 19 of the act, which provide for notice and subpœna to the debtor, the latter may contest the matters alleged against him in the petition, and may have, if demanded, a jury trial upon the issues. Section 4 provides that "upon an impartial trial, the debtor may be adjudged an involuntary bankrupt." By sections 55 and 44 a meeting of creditors is required to be held after an adjudication of bankruptcy, at which a trustee of the bankrupt's estate is to be chosen by the creditors, or upon their failure to agree, to be appointed by the court.

From the above provisions it is obvious that in every case of involuntary proceedings in bankruptcy, a considerable interval of time, more or less, must elapse between the filing of the petition and the appointment of a trustee competent to take and administer the estate. If in such cases the assigned assets legally belong to the bankrupt's estate, to be administered by the bankruptcy court and the trustee in accordance with the provisions of the bankrupt act, it is the duty of this court under section 2, subdivisions 3 and 15 of the statute, upon

suitable application, either to grant an order restraining the voluntary assignee from disposing of the property in the meantime, or else to appoint a receiver to take immediate possession of it.

Accordingly, the principal question discussed on this motion has been, whether an assignment without preferences made since the act of 1898 went into effect and made in conformity with the laws of this state regulating such assignments, is voidable by the trustee in bankruptcy.

If such an assignment with the state laws regulating the same and the distribution of the debtor's effects thereunder, could be treated as amounting substantially to a bankruptcy or insolvent act, the case of *Manufacturing Co. v. Hamilton*, 51 N. E. 529, recently decided on demurrer in the supreme court of Massachusetts, would be in point. There the plaintiff had been proceeded against as an insolvent debtor by a petition filed against it by the defendants in the insolvency court under the insolvent acts of Massachusetts, after the bankrupt act of July 1, 1898, went into effect. The insolvent acts of Massachusetts provide for such involuntary proceedings against a debtor, the seizure of his estate, the distribution of his assets, and the discharge of the debtor in certain cases, so far as the jurisdiction of the court extends. In view of the provisions of the last section of the act of 1898, that "proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it," it was held by the supreme court of Massachusetts that it was "clearly the purpose of congress that the new system of bankruptcy should supersede all state laws in regard to insolvency from the date of the passage of the statute." In its opinion as reported the court says:

"The rights of all persons in the particulars to which the act refers, are to be determined by the act from the time of its passage. Among these rights, is the right to have insolvent estates settled in bankruptcy under the provisions of the act, including the right to have acts of bankruptcy affecting the settlement of estates determined by it; to have the rights of debtors to file voluntary petitions, and of creditors to file involuntary petitions determined by it; and to have preferences and liens governed by the provisions of it. Sections 60, 67. These various provisions, affecting the rights and conduct of debtors and creditors, are different from those previously existing in most of the states, and perhaps different from those found in the laws of any state, and they supersede all conflicting provisions."

See, also, *Tua v. Carriere*, 117 U. S. 201, 6 Sup. Ct. 565.

Proceedings like those under the Massachusetts act rest wholly upon state statutes. Such statutes are practically bankruptcy acts, operating, however, only to the extent of the power and jurisdiction of state authority.

Voluntary assignments for the benefit of creditors, on the other hand, as practiced in this and other states, do not originate in the state statutes, but in the common-law power of the debtor to dispose of his property. The statute of this state passed in 1860 and subsequent acts regulate to a certain extent this power of distribution, and provide various securities therefor. To a considerable extent, therefore, these statutes and assignments made in conformity with them, though they make no provision for the discharge of the debtor, do cover in part the original purpose of bankruptcy laws, namely, the

equal distribution of the debtor's property among his creditors. The New York statutes, nevertheless, allow, besides preferences to employés, preferences to other creditors at the debtor's option to the extent of one-third of the assets (see *Bank v. Seligman*, 138 N. Y. 435, 34 N. E. 196); in this regard being, therefore, directly opposed to that equality of distribution which bankruptcy laws aim to secure. Though the precise limits of the terms "bankruptcy" and "insolvency" in defining the character of statutes, may not be easy to determine (see *Sturges v. Crowninshield*, 4 Wheat. 194-196; *In re Klein*, 1 How. 277-280, I do not think that a general assignment made in conformity with laws like those of the state of New York, can be considered "as a proceeding commenced under state insolvency laws" within the meaning of the last paragraph of the act of 1898; and the question presented on this motion must therefore be decided upon the general principles of bankruptcy law and upon the other provisions found in the present act.

In support of the validity of such assignments as against the trustee in bankruptcy it is urged (a) that the trustee can take no property save that which the statute gives him; (b) that the present act contains no provision making such assignments voidable, unless they are made with intent to defraud creditors; (c) that by section 70 the trustee takes the "estate of the bankrupt as of the date he was adjudged a bankrupt"; and it is claimed that in consequence of this provision the trustee's title cannot reach back so as to cover property previously assigned by the bankrupt. These objections seem to me to be insufficient.

1. The object of the bankruptcy act is declared to be "to establish a uniform system of bankruptcy throughout the United States." The most fundamental element in every system of bankruptcy has been to provide for and regulate the distribution of the bankrupt's property among his creditors, and to do this by means of the agencies created by the act. That originally was its only purpose. Later, a second element has been added in the provisions for the bankrupt's discharge, upon such terms and conditions as the act may prescribe. The present act fully provides for both of these objects. From the moment an act of congress establishing a uniform system for the administration of an insolvent's estate takes effect, every local or private system for the administration of the same assets, whether originating in the state statutes, or in the debtor's common-law power to transfer his property, and regulated, as in this state, by state law, is necessarily superseded provided the bankrupt act is invoked by creditors within the statutory period of limitation. Both systems cannot operate side by side as respects the same estate; the one must necessarily supersede the other; and the state and voluntary systems must yield to the system established by congress pursuant to the constitution. Voluntary assignments of all a debtor's property in trust for creditors, are just as incompatible with the purposes of the bankrupt act as state insolvent systems, and for precisely the same reasons, viz. because if allowed to stand as against a trustee in bankruptcy they defeat the most essential elements of the bankrupt law; namely, the distribu-

tion of the debtor's assets in the manner prescribed by the bankrupt act, and through the agencies to which that act commits them. Creditors are vested by the act itself with a right to have the bankrupt's assets administered not only in accordance with the act, but through the instrumentalities and under the supervision which the act provides; and this right manifestly cannot be nullified at the mere option of the debtor. And yet this is precisely what would happen, if voluntary assignments could stand against the trustee in bankruptcy.

2. Our bankrupt acts have been largely modeled upon the English statutes of bankruptcy. Many of their phrases are transferred literally to our own acts, and these phrases are presumably used by congress in the sense in which they have been previously interpreted in the English law. Since the time of George II. and even prior, the current of English adjudications, followed by our own, has been that a voluntary assignment of all his property by an insolvent debtor to an assignee of his own choosing, though without preferences, is itself an act of bankruptcy, a fraud upon the act, and hence a fraud upon creditors as respects their rights in bankruptcy, and voidable at the trustee's option, even without any express provision to that effect in the statute. These principles, and the long line of authorities in support of them from the time of Lord Mansfield, have been clearly set forth in the elaborate review of the subject by Judge Cadwalader in *Barnes v. Rattew*, 8 Phila. 133, 2 Fed. Cas. 868, and by Judge Emmons in *Globe Ins. Co. v. Cleveland Ins. Co.*, 14 N. B. R. 311, 10 Fed. Cas. 488, and need not be repeated here. The same views were adopted and reinforced by Judge Johnson on appeal in the case of *In re Biesenthal*, 15 N. B. R. 228, 3 Fed. Cas. 76, which settled the law in this circuit under the act of 1867. The general ground upon which all these cases, in the absence of express statutory enactments, have proceeded is that a voluntary assignment is in effect an act of bankruptcy, and is "fraudulent, not at common law, or under 13 Eliz., but because it defeats the rights of creditors secured by the bankrupt law to the choice of a trustee, to the summary jurisdiction of the bankruptcy court, and to the ample control which the law intended to give them over the estate of their insolvent debtor," and is therefore a fraud upon the act and upon creditors' rights, which prevents the assignee from holding the assigned estate as against the trustee in bankruptcy.

These general principles and the decisions enforcing them are as applicable to the present act as to the various English bankruptcy statutes and to our own acts of 1867, 1841 and 1800. They are not founded upon any special phrases in the bankruptcy statutes but upon the general scope, purpose and policy of bankruptcy laws, and the resulting rights of creditors.

Successive bankruptcy acts have from time to time adopted various additional provisions drawn from these prior adjudications; thus confirming by legislation in many particulars what may be called the common law of bankruptcy. But the absence of provisions declaratory of the settled law in no way diminishes its force or applicability. The act of 1867 was the first to expressly declare

voidable a debtor's transfers made "with intent to defeat or delay the provisions of the act"; but that had been the long-settled law; and voluntary general assignments had been long held to be acts of bankruptcy and void without inquiry into the debtor's intent, his intent to defeat the bankrupt act and to defraud creditors of its benefits being conclusively presumed from the necessary effect of his acts; and such was the weight of authority under the act of 1867. *In re Burt*, 1 Dill. 440, 4 Fed. Cas. 855; *In re Goldschmidt*, 3 N. B. R. 164, Fed. Cas. No. 5,520; *Boese v. King*, 108 U. S. 385, 2 Sup. Ct. 765.

But as the act of 1867 used the words "intent to defeat," etc., some decisions held that voluntary assignments might be validated by a finding of the absence of any such intent or any intent to defraud creditors. *Haas v. O'Brien*, 66 N. Y. 597. The statute of 1898 (chapter 541, § 3, subd. 4), however, by express enactment returns to the original doctrine, and makes an assignment for creditors ipso facto an "act of bankruptcy," without regard to the debtor's intent or his solvency. And though the present act unlike that of 1867 contains no clause expressly declaring that transfers "in fraud of the act" are void, it expressly dissolves all such liens acquired at law or in equity within four months prior to filing the petition as are "given or permitted in fraud of the act"; and this shows the general intent of the act in that regard to be the same as that of 1867.

3. The provision of the present act making a voluntary assignment ipso facto an act of bankruptcy in accordance with the original doctrine, could not have been intended as a mere vain and empty declaration, of no value to creditors. These words on the contrary can mean no less in the statute than they meant in prior decisions, viz. that both the bankrupt and the estate sought to be assigned in fraud of the act become thereby instantan subject to the operation of the bankrupt law.

Upon such an assignment, creditors are authorized to proceed instantan against the debtor as under the old law. Careful provisions are made in the present statute for these involuntary features and for preserving this right of procedure; and if notwithstanding these provisions, a voluntary assignment could stand valid as against the trustee in bankruptcy afterwards appointed, the whole object of declaring such an assignment to be an act of bankruptcy would be nullified. In that case, though the creditors invoking this express provision might immediately put the debtor into bankruptcy, they would thereby gain no control of any assets nor derive the least benefit from the bankruptcy proceeding; and while thus subjecting themselves to expense in the pursuit of their illusory rights, the only result would be to benefit the bankrupt by giving him a discharge for nothing. This cannot be the intent of the law. On this point Johnson, J., in the Case of Biesenthal, above cited, observes:

"To permit the administration of the assets of an insolvent and bankrupt debtor to be committed to a trustee of his choice and then to reduce the bankrupt law to a mere process of discharging a debtor from his debts, is quite inconsistent with any fair view of the purpose of this legislation."

If such an intent was not credible under the act of 1867, still less is it credible in the new law declaring such an assignment to be an act of bankruptcy. In the eye of the bankrupt law, the voluntary assignee is an accomplice in a fraud upon the act, for the reasons above stated, and therefore can hold nothing by the assignment as against the trustee in bankruptcy.

4. Section 67, subd. e, of the present act provides that any transfers made within four months prior to the filing of the petition "with intent to hinder, delay or defraud creditors, shall be null and void," and that the property shall "pass to the trustee." Except as to the time limitation this is in substance the provision that is found in the early English bankruptcy statutes and is the only provision they contained on this subject. But this provision as construed in the bankruptcy courts was not restricted to a condemnation of frauds at common law, or under 13 Eliz., but extended to all general assignments by an insolvent debtor to an assignee of his own choice, because as above stated they defraud creditors of the control, supervision and instrumentalities for the distribution of the estate, which the statute has provided for the creditors' benefit; and because the debtor must be held to have intended the necessary effect of his act.

The same construction should follow the same provision of the present act, except in so far as other provisions in the act may appear to be designed to take the place of this extended construction, such perhaps as may have been intended by clause 4 of section 70.

That section (70) declares that the trustee "shall be vested by operation of law" with the right to all "(4) property transferred by the bankrupt in fraud of creditors." No question of the bankrupt's intent is here involved. It is sufficient to bring the case within this provision, if the transfer operates to defeat any substantial rights of creditors under the bankrupt law; and the clear weight of authority has long been that general assignments by a debtor do necessarily have this effect.

Subdivision d of section 67 also declares liens to be valid that are "given or accepted in good faith and not in contemplation of or in fraud upon this act"; implying that liens should not be valid if given in fraud of the act, and condemning therefore by implication the lien or title of a mere voluntary assignee.

5. The clause in section 70 providing that the trustee shall be vested by operation of law with the title of the bankrupt "as of the date when he was adjudged a bankrupt," does not, I think, affect the question here considered. It was designed to fix the necessary dividing line between the bankrupt's past and future acquisitions. It debars the trustee from claiming the bankrupt's after-acquired property, but not his property previously transferred in fraud of the act. It means also that whatever the trustee acquires shall be deemed to vest in him as of the date of the adjudication, instead of the date of his election or appointment. But he is not limited to the bankrupt's own title and rights as they existed on that date, since clause 4 of the same section gives to the trustee property previously transferred in fraud of creditors, while section 67 provides for vacating

also various incumbrances which the bankrupt himself could not have attacked.

6. Aside from the above general considerations the specific provisions of the present bankrupt act afford to creditors such important advantages over an administration of assets through a voluntary assignee, under the state law, that such assignments must be held to be "transfers in fraud of creditors" because they necessarily deprive them of those advantages, viz.: (a) The choice of the trustee, and therewith the greater security, supervision and control in the disposition of the assets. (b) Liens by attachment, execution or other proceedings at law or in equity within four months, are voidable under the bankrupt law, but not so under a voluntary assignment. This is a difference that is often of extreme importance. (c) Under this assignment and by the state law applicable to it, employes are preferred without limitation as to amount or time; by the bankrupt law they are limited to \$300 each and to claims accruing within three months. (d) The fees and commissions may reach 5 per cent. chargeable under voluntary assignments in this state, but are much less under the bankrupt law.

Whether the act be considered therefore in principle or in detail, I must hold that a voluntary assignment for creditors which by the statute is made an "act of bankruptcy," is voidable by the trustee, and that the assets should be brought into the bankruptcy court. The motion for a restraining order is therefore granted.

IN RE GUTWILLIG.

(District Court, S. D. New York. December 6, 1898.)

BANKRUPTCY — VOLUNTARY ASSIGNMENT — REPLEVIN BY CREDITOR IN STATE COURT—ABUSE OF PROCESS—RESTRAINING ORDER.

After a voluntary assignment for the benefit of creditors, a vendor of goods alleged to have been purchased by fraudulent representations assigned his claim, and the assignee thereof brought replevin against the voluntary assignee under which a promiscuous seizure was made by the sheriff of goods in possession of the voluntary assignee, including goods not described in the writ as well as goods manufactured and in process of manufacture; the next day involuntary proceedings in bankruptcy were commenced by creditors; on motion to restrain the sheriff from delivery of the goods seized, *held* (1) that section 23b of the act of July 1, 1898, does not limit the right of a trustee in bankruptcy to sue in such cases in the state courts, that clause being confined to suits which the bankrupt himself might have brought but for proceedings in bankruptcy; (2) that the abuse of the replevin process, other circumstances in the case, and the proper defense of the rights of creditors in bankruptcy, require that the delivery of the property by the sheriff should be restrained.

(Syllabus by the Court.)

In Bankruptcy. On motion to dissolve a restraining order preventing the sheriff from delivering certain replevied goods.

A. A. Joseph, for petitioner.

George F. Fielder, for assignee.

Alexander Blumenstiel and S. F. Kneeland, for creditors in bankruptcy.

BROWN, District Judge. On November 9, 1898, Henry Gutwillig, a manufacturer of garments at 536 Broadway, made a general assignment for the benefit of creditors to William L. Stone, Jr., assignee. Thereafter on the same day the sheriff of this county on a writ of replevin in an action brought in the state supreme court by William H. Codey against Gutwillig and Stone, his assignee, took from the assignee's possession certain goods which the sheriff still retains. On November 10th a petition was filed in this court by the creditors of Gutwillig to have him adjudged a bankrupt, and on the 11th of November a restraining order was issued by this court addressed to the assignee and the sheriff forbidding them from disposing of or parting with any of the property. The present motion is to relieve the sheriff from that order so as to permit him to deliver the property replevied.

The affidavit in support of the motion states that the property claimed in the replevin suit, consisting of 29 cases of Kronstadt flannels (51,151 yards) was bought by Gutwillig of Minot, Hooper & Co., "under a fraudulent statement as to his financial condition, and with intent not to pay for it"; that Minot, Hooper & Co. had assigned their claim to the petitioner Codey, who thereupon commenced the suit in replevin, and now seeks to have the restraining order vacated as respects the sheriff.

The affidavits opposed to the motion show that about one-half of the property seized by the sheriff in executing the writ of replevin consisted of property not described in the writ, and that he also seized garments manufactured and in process of manufacture in which were other materials as well as the labor expended in making them. These facts show a gross abuse of the writ of replevin. Such abuses it is said are common and notorious. They are not only a fraud upon the law and the courts, but enable creditors by these means to obtain a preference over general creditors, and are within the direct condemnation of section 67c of the bankrupt act. In cases like the present, moreover, where the bankrupt has made a voluntary assignment of his property to an assignee from whom the property is taken, and bankruptcy proceedings have been thereafter instituted, there are special difficulties in the way of any adequate protection of the rights of general creditors except through a restraining order until a trustee in bankruptcy can be appointed. The voluntary assignment being itself an act of bankruptcy subjecting the assigned property, as I have recently held, to distribution in the bankruptcy court, the voluntary assignee has little inducement to undertake the burden of a litigation, and too often the debtor for ulterior advantages to himself is little inclined to obstruct preferences sought to be acquired in this way.

In the present case, moreover, none of the facts or circumstances on the part of the plaintiff in replevin have been so presented either in the replevin papers or upon this motion as to enable the court to form any judgment whether the plaintiff therein has a probable cause of action or not. The replevin suit is not in the name of the original vendors of the goods, but in the name of Codey, an assignee. The assignment

of a claim of such a nature, and its prosecution through an assignee, unexplained, give it a shadowy and fictitious hue, and the serious abuse of the process raises still further question of its good faith.

It is urged that the trustee in bankruptcy can be substituted as defendant in place of the bankrupt under section 11b of the bankrupt act, and that by section 23b any suit by the trustee in reference to this property must be prosecuted in the state courts. Even if these contentions were correct it would still be necessary to stay those proceedings until the trustee in bankruptcy could be chosen. But it is doubtful if any adequate relief would be afforded to the trustee by being substituted when chosen in the place of the bankrupt as defendant. In the state court, were the plaintiff's suit defeated, the property would be awarded to the voluntary assignee, unless that court could collaterally in effect adjudicate on the title as between the bankrupt and the assignee, which in the absence of any adjudication in the particular case in this court, it is doubtful whether the state court would be inclined to do.

Nor in my judgment is the contention correct that the trustee could only sue the sheriff in the state courts for abuse of the process. Section 23b is expressly limited to suits which the bankrupt himself "might have brought if proceedings in bankruptcy had not been instituted." The bankrupt, in consequence of his voluntary assignment, could not have brought any suit against the sheriff for this trespass; nor could he bring any suit to declare the assignment void as to creditors, or as respects the bankrupt law; nor any suit to prevent the appropriation of the value of the other materials and labor, admixed possibly with the vendor's flannel, from being appropriated for Codey's benefit to the prejudice of other creditors, such as might be maintained in a court of bankruptcy, as in a court of equity. It is in that court under section 2 that such controversies should be determined, where the severe rule of law as regards title by accretion or admixture, which is enforced justly, it may be, against the wrongdoer (*Silbury v. McCoon*, 3 N. Y. 379; *Guckenheimer v. Angevine*, 81 N. Y. 394; *Cavin v. Gleason*, 105 N. Y. 261, 11 N. E. 504; *Joslin v. Cowee*, 60 Barb. 48; *Hyde v. Cookson*, 21 Barb. 92), is not applicable as against creditors or other vendors having equal or superior rights (*Bank v. Goddard*, 131 N. Y. 502, 30 N. E. 566; *Bank v. Dunn*, 97 N. Y. 149, 159).

The motion is denied.

NEWTON MFG. CO. v. WILGUS.

(Circuit Court, S. D. California. November 21 1898.)

No. 713.

1. PATENTS—SUIT FOR INFRINGEMENT—CONCLUSIVENESS OF FORMER JUDGMENT.

A judgment for defendants in an action at law for the infringement of a patent, upon the ground that the article covered by plaintiff's patent was a mere adaptation of a device covered by a prior patent owned by defendants, is conclusive in a subsequent suit for infringement by an assignee of defendant's patent against the plaintiff in the former action, not only of the invalidity of the latter's patent, but also that articles made in conformity with that patent are infringements of the earlier patent owned by complainant.

2. JUDGMENT AS ADJUDICATION—EXTRINSIC EVIDENCE TO SHOW QUESTIONS DETERMINED.

To apply a judgment and give effect to the adjudication actually made, where it does not fully appear from the judgment itself, resort may be had to extrinsic evidence, such as the evidence contained in the record and special findings made by the jury.

This is a suit in equity by the Newton Manufacturing Company against Daniel C. Wilgus for infringement of a patent.

M. L. Graff, for complainant.

Cole & Cole, for defendant.

ROSS, Circuit Judge. Prior to the bringing of the present suit, the defendant to the suit commenced an action in this court against Eugene Germain, Isaac B. Newton, and William H. Mitchell, composing the firm of the Crown Sprinkler Company, to recover damages for the alleged infringement of letters patent No. 443,734, issued to the then plaintiff, December 30, 1890, for an "improvement in lawn sprinklers." The defendants to that action denied that the patentee was the inventor of the lawn sprinkler so patented, denied infringement, and alleged that, prior to the date of his alleged invention, letters patent had been issued by the United States to one Clement Gauthier, for an invention called therein "atomizer," substantially identical with that described in the Wilgus patent. The case was tried before the court with a jury, and a general verdict was rendered for the defendants to the action, together with answers to certain special issues submitted. The issues and answers were as follows:

"(1) Was Clement Gauthier the inventor of a patent described in letters patent of the United States, No. 386,121, issued by the patent office of the United States of America, on the 7th day of July, 1888, and for which an application had been filed in said office on the 22d day of November, 1887, and for which letters patent on the 23d day of April, 1887, had also been issued to him by the republic of France? Answer: Yes. (2) Did Clement Gauthier assign said patent, issued by the government of the United States, to W. H. Mitchell, and did said Mitchell assign three-fourths interest therein to Eugene Germain and I. B. Newton, and were such assignments duly recorded in the patent office of the United States? Answer: Yes. (3) Did said patent include a nozzle with a tangential inlet, so as to produce a gyratory motion of the water in the barrel or cylinder, and have a top opening inwardly, so as to come to a sharp edge where the water first came in contact with such opening? Answer: Yes. (4) Is there anything in the specification, drawings, or claim in said patent limiting the size of said nozzle? Answer: No. (5) Is there anything in the specifications, drawings, or claims in said patent limiting said nozzle to any particular shape or form? If so, state what such limitation is. Answer: Nothing. (6) If the nozzle described in the Clement Gauthier patent, No. 386,121, were made of the same size as the one introduced in evidence as plaintiff's sprinkler, would it substantially perform the same functions in the same way as that of plaintiff? Answer: Yes. (7) If there is any difference between the plaintiff's sprinkler and the nozzle mentioned in the Clement Gauthier patent, if made of the same size, as to the functions performed by each, or the manner in which such functions are performed, state it fully. Answer: * * *. (8) Was the patent issued to plaintiff, No. 443,734, dated December 30, 1890, and was the application therefor filed in the United States patent office, June 14, 1890? Answer: Yes. (9) Is there anything in the specifications, drawings, or claim in plaintiff's patent limiting its size? Answer: No. (10) Does Clement Gauthier, in his specification and claim, show that his invention has for its object to subdivide the water by means of the tangential inlet and orifice or opening or top of the

muzzle, by which the gyratory motion is first given to the water in the barrel or cylinder, and discharged as a spray from the top or opening? Answer: Yes. (11) If the nozzle described in Clement Gauthier's patent is quite small, will the water be discharged as a fine mist or spray? Answer: Yes. (12) If the nozzle described in the Clement Gauthier patent, No. 386,121, is made the same size as plaintiff's sprinkler offered in evidence, will the water be discharged therefrom in larger quantities, and as a heavier spray or sprinkle? Answer: Yes. (13) Has Clement Gauthier's patent, No. 386,121, a tangential inlet into a circular reservoir or barrel, with a central discharge opening at the top? Answer: Yes. (14) Is the central discharge opening at the top of Clement Gauthier's patent tapering inward to a sharp or knife-shaped edge? Answer: Yes. (15) Is there any difference between the action of the water passing through the nozzle described in Clement Gauthier's patent, when the nozzle thereof is made of the same size as plaintiff's sprinkler, and the action of the water in passing through plaintiff's sprinkler? Answer: No. (16) If you should answer that there is a difference, state fully what such difference is. Answer: * * *. (17) Does plaintiff make any claim for the concave top of his alleged invention? Answer: Yes. (18) How many sprinklers did defendant sell or dispose of? Answer: * * *. (19) Was plaintiff damaged by reason of the sale or disposition of the sprinklers sold or disposed of by defendants, and, if so, in what amount? Answer: * * *."

Upon the verdict so returned and entered, judgment was, on September 4, 1894, entered by the clerk, that the plaintiff, Wilgus, take nothing by his action, and that the defendants to the action recover their costs from the plaintiff; the judgment upon its face reciting only the general verdict. The plaintiff in that action carried the case by writ of error to the circuit court of appeals for the Ninth circuit, where the judgment was affirmed. 44 U. S. App. 369, 19 C. C. A. 188, and 72 Fed. 773. In concluding its opinion, the court there, after considering various points assigned as error, said:

"There are several assignments of error which challenge the rulings of the court in giving and refusing instructions. It will be unnecessary to refer to them in detail. They are all based on the general assertion and contention of the plaintiff in error that there is no similarity in name, shape, size, or construction between the inventions of Gauthier and Wilgus. It is urged that the Gauthier patent is intended for spraying trees and plants; that it differs in shape from that of Wilgus; and that it delivers the fluid in the form of mist, whereas the Wilgus sprinkler delivers water for sprinkling purposes only, and in the form of drops; that in the one patent the opening for the discharge of the fluid is smaller than the opening for its inlet into the nozzle, while in the other the reverse is true. Other points of difference are pointed out. All these questions were properly submitted to the jury. There was evidence to the effect that the principle of both sprinklers was the same, and that their operation was the same. It does not follow as a rule of law that, because the Gauthier sprinkler was used in sprinkling trees, and delivered the fluid in the form of mist, the Wilgus sprinkler, which was used to sprinkle lawns, and delivered the water in drops, was not anticipated in the prior invention,"—citing *Tucker v. Spalding*, 13 Wall. 453; *Smith v. Nichols*, 21 Wall. 112; *Machine Co. v. Murphy*, 97 U. S. 120, 125; *Machine Co. v. Keith*, 101 U. S. 479.

One of the questions in the present suit is whether the judgment in the action just referred to is conclusive of the rights of the present parties. The defendant to this suit was the plaintiff in that action, and the complainant in the present suit is the successor in interest of the defendants in that action; the present bill as amended alleging, and the answer thereto not denying, that the complainant, prior to the commencement of the suit, acquired, by mesne conveyances, the

Gauthier patent, and the rights thereby conveyed, for all the states and territories of the United States, together with all royalties for the use thereof within the states and territories of the United States, and the right to recover any and all damages growing out of any infringement within such states or territories of that patent. The bill further alleges that on and after June 9, 1890, and up to the commencement of this suit, and during the life of the Gauthier patent, the defendant, Wilgus, without license, and against the will of the complainant and its assignors, did make and use, and cause to be made and used, a large number of specimens of an apparatus or machine containing and embodying substantially the invention covered by the complainant's patent, in infringement of the exclusive right thereby granted and secured to the complainant, to the profit of the defendant and the injury of the complainant; that the defendant claims the right to make and use, and to cause to be made and used, such machines under the subsequent and hereinbefore mentioned patent issued to him for improvements in lawn sprinklers. The bill as amended then pleads the judgment rendered in the law action of Wilgus against Germain and others, already mentioned, as a conclusive determination of the rights and obligations of the respective parties in respect to the two patents mentioned, and prays an accounting by the defendant of the profits derived by him growing out of the alleged sales by him of the machines mentioned, and that he be adjudged to pay the amount of such profits, with costs, and be enjoined from the further infringement of the complainant's patent. The answer of the defendant to the amended bill does not deny the making, sale, or use by him of lawn sprinklers in accordance with the patent issued to him, but does deny and put in issue the averments of the bill in respect to the identity or similarity of the two patents, and does deny any infringement by the defendant of the Gauthier patent. The answer admits the rendition and entry of the judgment in the law action of Wilgus against Germain and others, but denies the effect thereof as alleged in the bill. It alleges that the defendant is the original inventor of the lawn sprinkler described and claimed in the Wilgus patent, in conformity with which, he alleges, were all the sprinklers made, used, or sold by him, or that were by him caused to be made, used, or sold, and denies that he has ever claimed the right to make or use, or cause to be made or used, any apparatus or machine containing or embodying the invention covered by the Gauthier patent. It is true, as claimed by counsel for the defendant, that the validity of the latter patent was not involved in the action of Wilgus against Germain and others. But it is also true that there is nothing in the answer to the bill in the present suit, or in the evidence, to call in question its validity. It is therefore to be taken as valid; for, having been produced, the patent is *prima facie* evidence that the patentee first made the discovery claimed by him as an invention, and that it did in fact constitute a new and useful invention. So was the Wilgus patent, *prima facie*, valid when it was brought in question in the action between Wilgus and the predecessors in interest of the present complainant. In that action the validity of the Wilgus patent was directly involved, for the action was, as has been

seen, one for the recovery of damages for its alleged infringement, in which the defendants to the action contested the validity of the patent, on the ground that Wilgus was not the inventor of the sprinkler therein described, but substantially copied the device previously patented to Gauthier. Unless that defense had been sustained in that action, the plaintiff there would unquestionably have been entitled to judgment; for it clearly appears from the transcript of the record in that case, which has been introduced in evidence in the present suit, that it was not disputed that there was an infringement of the Wilgus patent by the defendants, if that patent was valid. Said the court in its instructions to the jury in that case:

"If the plaintiff's patent is valid, it is not disputed that there was an infringement of it by the defendants. But the defendants contend that the plaintiff's patent is invalid; that he never did invent the sprinkler claimed by him as an invention; that it was but an adaptation of an invention made by one Gauthier, for which the United States issued to him a patent, on the 17th day of July, 1888. If that be true, it will follow that the patent issued to the plaintiff was invalid."

In that action, as shown by the record, many forms of the devices described in the two patents were introduced in evidence, including sprinklers made and sold by the defendants thereto, similar to the Wilgus sprinklers, and which were confessedly infringements of the Wilgus patent if it was valid. Much expert testimony was also introduced in that action in respect to the alleged similarity and dissimilarity of the various exhibits, and the jury was given observation of the practical operation of the sprinklers made in accordance with the Wilgus patent, and of the various forms of the device described in the previous patent issued to Gauthier. After instructing the jury in respect to the law applicable to the case, the court proceeded to say to the jury in that action:

"You have heard the testimony of the witness Lyall, to the effect that in 1887, while he and the plaintiff were working in the Los Angeles Tool Works, the plaintiff brought to him [Lyall] a device similar to Defendants' Exhibit 4, which witnesses for the defendants have testified was made in conformity with the Gauthier patent, and that the suggestion was then made that that device enlarged would make a good sprinkler, and that both he and Wilgus copied that device, from which they made sprinklers similar to those introduced in evidence as the 'Wilgus' and 'Crown' sprinklers. This testimony of Lyall is denied by the plaintiff. It is for you to say which of these witnesses told the truth, for you are the exclusive judges of the credibility of each and every witness. If it be true that the plaintiff, in the construction of his sprinkler, copied in substance the device patented to Gauthier, it follows, as a matter of course, that he was not the inventor of his sprinkler; for, as I have already said to you, a patentable invention is a mental result, and must be new as well as useful. Inventive genius is properly encouraged by the law, which is careful to protect real inventors in the enjoyment of the results of their genius. But it is equally carefully to withhold relief from, and to dismiss from its precincts, mere pretenders and copyists of other men's inventions. Unless the evidence satisfies you that the instrument or device described in the Gauthier patent was based upon substantially the same principles of construction, and did produce in substantially the same way substantially the same results, as the sprinkler claimed to have been invented by the plaintiff, or that the plaintiff, Wilgus, instead of inventing the sprinkler claimed by him, merely copied, in its construction, the prior invention of Gauthier, then the court instructs you that the prima facie case made by the introduction of the plaintiff's patent has not been overcome; and in

that event your verdict should be for the plaintiff, if you further find there has been an infringement of it by the defendants."

From what has been said it is plain that the verdict and judgment in the case of Wilgus against Germain and others were based, and could only have been based, upon the ground that the Wilgus patent was a mere adaptation of the device covered by the prior patent issued to Gauthier, and shown by the various forms of machines introduced in evidence as exhibits in the case, and was for that reason invalid. That the judgment thus given—the court having jurisdiction of the subject-matter and of the parties—is good as a plea in bar, and conclusive when given in evidence in a subsequent suit between the same parties or their privies, upon the same point, is well settled. *Hopkins v. Lee*, 6 Wheat. 109; *Bank v. Beverly*, 1 How. 134; *Thompson v. Roberts*, 24 How. 233; *Cromwell v. Sac Co.*, 94 U. S. 351; *Lumber Co. v. Buchtel*, 101 U. S. 638; *Russel v. Place*, 94 U. S. 606. It results that that judgment is a conclusive determination, as between the present parties, not only of the invalidity of the Wilgus patent, but that sprinklers made in conformity with that patent are substantially copies of the device patented to Gauthier. The record in the former case clearly shows that that precise question was raised and determined by the verdict and judgment in that action. Even if it be conceded that this would not appear from the general verdict and judgment, considered by themselves, yet the law is that, to apply the judgment and to give effect to the adjudication actually made, resort may be had to extrinsic evidence. *Russel v. Place*, 94 U. S. 608. In the present instance, the special verdict of the jury, as well as the evidence in the action of Wilgus against Germain and others, embodied in the transcript introduced in evidence here, abundantly shows that the question whether sprinklers made in conformity with the Wilgus patent are substantially copies of the device patented to Gauthier was distinctly raised in that action, and determined against the plaintiff there, defendant here. In the present suit it is not denied, but affirmatively shown, that the sprinklers made, used, and sold by the defendant also conformed to the patent issued to him, and are therefore similar.

There must be an interlocutory decree for the complainant, and a reference to a master to take the accounting prayed for.

INDIANA NOVELTY MFG. CO. v. CROCKER CHAIR CO.

SAME v. SMITH MFG. CO.

(Circuit Court, E. D. Wisconsin. November 7, 1898.)

1. PATENTS—ANTICIPATION—PUBLIC USE.

The use of a wooden rim for bicycle wheels, during six years or more, on bicycles made and sold to the public for actual use, not only by the inventor, but by other manufacturers who copied from him, was a public use, which renders invalid a subsequent patent to another for a similar rim, of which the former was clearly an anticipation; and it cannot be considered an abandoned experiment, and without effect as an anticipation, because it did not during such time come into such general use as it did after the patent was granted, and after the use of the

bicycle itself had enormously increased, nor because the inventor had in the meantime acquiesced in the rejection of his application for a patent therefor.

2. SAME—WOODEN RIMS FOR BICYCLE WHEELS.

The McKee & Harrington patent, No. 506,430, for a bent wooden rim for rubber-tired bicycle wheels, is void for anticipation by a rim similar in all respects to that described, which was made and used by John C. Garrood between 1885 and 1887.

3. SAME—TONGUED AND GROOVED JOINT FOR BICYCLE RIMS.

The Marble patent, No. 547,732, for a wooden rim for bicycle wheels, the only novel feature claimed being a series of tongues and grooves glued together and extending longitudinally in the plane of the wheel to unite the two ends of the rim, is void for want of patentable novelty.

Two separate actions are brought for infringement of the same patents, both submitted by stipulation upon the same testimony. The complainant is the owner of the following letters patent: No. 506,430, granted McKee & Harrington, October 10, 1893, and designated throughout the record as the "Harrington patent"; and patent No. 547,732, granted to the complainant, as assignee of George W. Marble, October 8, 1895, and referred to as the "Marble patent." The claims in the patents, respectively, so far as involved in these suits, are as follows:

Under the Harrington patent, claims 1 and 4, which read as follows:

"(1) The herein-described method of making a rim for rubber-tired bicycle wheels; that is to say, by bending a single flat piece of wood in a circle, splicing the meeting ends, and then turning the rim to the requisite shape, substantially as set forth and described."

"(4) A wood wheel rim adapted and arranged to receive a rubber tire, said rim being bent from a single piece of wood, and provided with holes to receive the spokes, metallic washers being seated in the wood surrounding the spoke holes, protecting the wood, and preventing the drawing of the spokes therefrom, substantially as shown and described."

Under the Marble patent, the following claims:

"(1) In a bicycle wheel, the combination with a pneumatic or elastic tire and suspension spokes, of a wood rim consisting of a solid strip of wood bent in circular form, channeled on its outer periphery to receive said tire, and having its meeting ends each provided with a series or multiplicity of long, narrow, interfitting tongues and grooves, glued together, extending longitudinally of the rim and in the place of the wheel, the ends of the tongues on one end of the rim strip fitting or abutting against the end or bottom of the corresponding grooves on the other end of the rim strip, whereby said rim is furnished with means for performing the triple functions of resisting collapse or compression due to the tension of said suspension spokes, of acting tensilely to bind or hold the parts of the wheel together, and of resisting breakage, flexure, or displacement, as required in its combination with said pneumatic tire and suspension spokes, substantially as specified.

"(2) In a bicycle wheel, the combination with an elastic tire and suspension spokes of a wood rim serving to resist collapse or compression, tensile strains, and also breaking or flexure strains, and consisting of a solid strip of wood, channeled on its outer periphery to receive said tire, and having its meeting ends furnished with a series or multiplicity of interfitting tongues glued together, the glued side surfaces of said interfitting tongues affording an extended glue surface, lying substantially in the plane of the wheel, and longitudinally of the rim, so as to resist tensile and breakage or flexure strains, substantially as specified."

The question of the validity of these patents was raised by demurrer to the bill, assigning as the ground that it appeared upon the

face of the letters patent that the claims were for nonpatentable subject-matter; but the demurrers were overruled, in the view that an inquiry was involved as to the state of the art which could be determined only upon proofs at final hearing.

Munday, Evarts & Adcock, for complainants.

H. G. Underwood and Winkler, Flanders, Smith, Bottum & Vilas, for defendants.

SEAMAN, District Judge (after stating the facts as above). The controversy in these cases relates wholly to the patentable novelty of the claims in question under each of the letters patent. The utility of the devices, especially as they are embodied in patent No. 547,732, is unquestioned, and infringement is contested by objections only to the sufficiency of the proofs. The issue involved of anticipation in the prior art, which is frequently one of complexity and nice distinctions, is here simplified by the nature of the testimony, the undoubted authenticity of the exhibits, and the clear presentation in connection with the state of the art.

1. The Harrington patent, No. 506,430, rests solely upon the date of filing the application for the presumptive date of discovery, namely, March 6, 1893. Laying aside the several prior patents which were introduced as disclosing the use of wood rims for bicycle wheels, and numerous others of which it is claimed that they show analogous prior use, it is sufficient and controlling for the purposes of this inquiry that the device made by the witness John C. Garrood between the years 1885 and 1887, which entered into public use during several years thereafter, perfectly anticipates the Harrington device. This Garrood production is established beyond doubt by concurring witnesses, by an exhibit original wheel, exhibit original rims, old photographs, and confirmed by Garrood's application filed in the patent office January 10, 1887, to procure letters patent on this device,—as an "improvement in vehicle tensional wheels, in which an endless rubber tire is secured into a wood felloe, made in one piece, and turned up all over it, steel wire spokes, and a steel or other suitable metal hub,"—which application was rejected in that office, and there left, without further prosecution. Garrood's device was also employed by the witness Turner, and by one Anderson, a manufacturer of bicycles, each of whom made these rims with some attempted improvements, which entered into use in bicycles to some extent, all prior to the Harrington application. Indeed, the evidence of the Garrood rim is so satisfactory as to time, design, and publicity that counsel for complainant conceded, in the course of his argument, that it was clearly an anticipation of the discovery claimed by Harrington, but for failure to carry it into general use in the manufacture of bicycles, which is asserted to create an exception from the general rule, and place this rim, and those of Turner and Anderson as well, in the category of abandoned experiments.

With this frank admission of strength in the interesting showing of fact, no review is called for beyond the testimony relating to the character and extent to which these wood rims entered into use.

Garrood was engaged with his father in the manufacture of bicycles in England prior to 1881, when he came to America, and entered upon the same line of work, first in Boston, and later at Lynn, Mass. Having devised the wood rim for bicycles, he constructed the high-wheel exhibit between 1885 and 1887, in Lynn, where he had it in constant use for seven years, attracting the notice of wheelmen there and in Boston as well. He made similar wheels from time to time, which were furnished to manufacturers and individuals, and entered into bicycles, of which he names several instances, and states that at least 25 rims were so made by him and used; that some so made were sold by him over the counter. In 1888, or earlier, he made, for separate purchasers, who are named, two tricycles, with similar rims, which were for years in successful use, became well known, and are clearly identified by original photographs taken in 1888. Garrood's operations were in Lynn, and extended to the close of 1890, but were not carried on in wood rims after that year, except in two later instances mentioned, which are apparently sporadic. The witness Turner, a woodworker, having his shop in Boston, there manufactured wood rims for bicycles of this pattern for a period of about six months in 1891, supplying manufacturers, of whom he names the Novelty Woodwork Company, Peter Berlo, and a few made for Mr. Garrood. Mr. Turner also testifies to similar construction of wheels by one Anderson, a manufacturer of bicycles in Boston (who made an improvement in the splice, which will be referred to under the Marble patent); but the extent or duration of the Anderson use is not clearly shown, although rims are produced and identified as made by him, and one made by Turner as well.

The use thus disclosed was manifestly a "public use," within the meaning of the term as employed in the patent law, to render a later production of identical means nonpatentable, without regard to actual knowledge of such prior discovery and use. It is the fact of use given to and received by the community at large, in contradistinction to shop experiments, or mere occasional exhibitions, or use by the inventor alone, which must control; and it is not to be measured by degrees or territorial extent, nor made dependent upon any probability of fact that knowledge of such use should have reached the later claimant. Therefore I can find no tenable ground for excepting the use here shown from the general rule. It was fairly constant for a period of at least four or five years, when the demand for bicycles, and the bicycle art as well, were in the formative stage,—an infancy of surprising length, when viewed in the light of their growth within the past few years. If the use be regarded as local in Boston and Lynn, it was made public in a locality which was probably the most important manufacturing center for bicycles at that stage of the art; and the wood rim introduced by Garrood was not only utilized there in a number of practicable wheels, but was placed on the market, taken and used by manufacturers, and presumably the wheels so made were sent out to customers elsewhere. How widely the information was carried that wood rims were practicable cannot, of course, be known, nor is it material in the view indicated. That they

did not then win their way to immediate popularity cannot be charged to defects in the design, as compared with that of Harrington, for there is no substantial difference; but apparently the Garrood rim entered the field too early to find a public which was anxiously seeking wheels of every grade, and educated to appreciate the advantages and capabilities of the bent wood rim. The design was given out to the public, but remained in abeyance, to be called for when the demand for bicycles was more general. The only abandonment, in the sense of patent law, arises out of Garrood's acquiescence in the rejection by the patent office of his application, which affects the right to a monopoly, but has no relation to the active use of the device. I am of opinion that the defense of anticipation is clearly established against the claims referred to in letters patent No. 506,430, and have found it unnecessary to consider the further interesting questions of novelty which were discussed to some extent upon demurrer to the bill.

2. The remaining patent in suit is No. 547,732, for a "wooden-rim bicycle wheel," issued to George W. Marble, assignor, October 8, 1895, on application filed December 22, 1893. This patent embodies the wood rim as described by Harrington, but substitutes for the lap joint of the latter a joint consisting of "a series or multiplicity of tongues and grooves, glued together, extending longitudinally of the rim and in the plane of the wheel." The joint is therefore the sole feature in the combination for which novelty is claimed, and as to that element it is well conceded that the tongue and groove or dovetail, with or without glue, is an old and well-known form of joint in numberless productions of wood. Its use to join the ends of a rim of bent wood to form a pulley is found in letters patent No. 216,095, issued to P. Medart in 1879; but examples are too common to require citations. In the prior bicycle rim of Anderson, produced here, and referred to in considering the Harrington patent, the tongue and groove joint constitute the sole improvement over Garrood. The joint introduced by Marble is, however, claimed to have peculiar form, founded upon his alleged discovery "that a glued joint between two pieces of wood is many times stronger against breaking strains applied in the plane of the joint than it is against breaking strains applied at right angles to the plane of the joint." Accordingly, his tongues and grooves are described in the patent as "extending longitudinally of the rim, and in the plane of wheel," while in the common form they appear to have been placed at right angles to that plane. Whether this change is one "in the form of embodiment, of mere degree or quality of action, without changing the function of any element or adding a new element," and not patentable (*Baldwin v. Kresl*, 46 U. S. App. 511, 526, 22 C. C. A. 593, and 76 Fed. 823); or whether it constitutes a departure so radical in its operation, and so meritorious in results, as to be entitled to the grant on the broad basis of equitable consideration,—are interesting inquiries, which do not require decision in this case, if my conclusion is well founded as to the proof of prior use of this exact form of joint for analogous purposes. In United States letters patent No. 231,002, issued to W. Briggs, August 10, 1880, for a chair-seat rim, the meeting ends of a single strip of bent

wood are united by a dovetail joint made in the same plane; and in United States letters patent No. 238,491, issued to G. E. Davis, March 8, 1881, also for a chair-seat rim, the meeting ends of the strips of wood forming the rim are each united by a tongue and groove in the plane of the rim, and evidently for the same object claimed by Marble. This rim is subjected to strain in the same direction as in a wheel rim, although the degrees of strain are quite different. Other patents which are introduced show joints in the general art of striking similarity. But the archery bow exhibits in evidence, which are well authenticated as long antedating the alleged discovery by Marble, show this exact form of tongue and groove structure where the pieces of wood are united to make the bow. And in a book published in 1878, entitled the "Witchery of Archery," by Thompson, the fact is mentioned that archery bows are commonly made of pieces so united by tongue and groove joint. See page 229. Of these exhibits, Mr. Dayton, the expert on behalf of complainant, says: "The principle of the Marble joint is there, but in an undeveloped, unappropriated, and apparently unrecognized form;" although he further insists that the use is not analogous, and would not suggest that employed by Marble. I am satisfied, however, that this use is not fairly distinguishable, and that it clearly anticipates the joint described in the Marble patent. The advantage in the strength of the joint obtained by placing the glued surfaces in the plane of strain was well exhibited at the hearing by means of a testing machine. The utility of a joint so made, and its superiority for the requirements of the bicycle wheel, are unquestioned. But patentable invention can neither be founded on the value of the device, nor be denied because of its simplicity alone as now viewed. The testimony is convincing that the joint so made by Marble was not an original discovery by him, and I am constrained to the view that there is no patentable novelty in the claims. The bill must be dismissed for want of equity. So ordered.

PENNSYLVANIA STEEL CO. et al. v. VERMILYA.

(Circuit Court of Appeals, Third Circuit. November 28, 1898.)

No. 36. September Term.

PATENTS—RAILWAY SWITCHES.

The Brahn patent, No. 248,990, for an improvement in railway switches, relating particularly to the crossbar and lugs which serve to connect the pointed or movable rails of the switch, discloses patentable invention, but, in view of the prior art, must be restricted to the particular devices, substantially as described. The claim is, however, infringed by a device made according to patent No. 308,373, which merely shows a variation in the form of the jaws.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit in equity by Allen G. N. Vermilya against the Pennsylvania Steel Company and its receivers for infringement of a patent. There was a decree for complainant (87 Fed. 481), from which defendants appeal.

Joshua Pusey, for appellants.

A. G. N. Vermilya, in pro. per.

Before ACHESON, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

ACHESON, Circuit Judge. This suit was for the infringement of letters patent No. 248,990, dated November 1, 1881, granted to James Brahn for an improvement in railway switches. The patent has a single claim, in these words:

"In a railway switch, the combination, with the pointed or movable rails, B B, of the lugs, C, fabricated as specified, and composed of the body, c, adapted to fit upon and depend somewhat below the flange of the rail, and the upwardly reaching flange, c¹, adapted to fit against the body of the rail, and having the jaws, c², together with the forged bars, D, having the flattened ends, d, all substantially as and for the purpose described."

The circuit court sustained the patent, and held that the defendants' device was an infringement. Upon the first branch of the case the judge below said:

"The evidence, including several prior patents and the exhibit 'Pennsylvania Steel Company's Circular,' conclusively shows that the invention of Brahn was not a primary one; but I cannot agree that he made no invention at all. He devised, in complete and combined shape, a convenient and improved arrangement of crossbar and lugs, which, though nearly approached, had not been before produced. His contribution to the art involved invention, although not of the highest order, and was both new and useful. The construction he devised was more convenient and better fitted for use than any of the appliances which had preceded it; and what is said in the defendant's circular of the advantages of the 'socket' connecting bar covered by patent No. 308,373, under which the defendant manufactures, might, in the main, be equally well said of the Brahn device."

We have reached the conclusion that the foregoing views are correct. While Brahn made no great advance in this art, yet his improvement, we think, was patentably new and useful. Under the proofs, the circuit court did not err in adjudging the patent to be valid.

That the appellants (the defendants below) infringe the patent seems quite clear. We agree with the court below that their device "is essentially identical with the device of Brahn." Upon both branches of the case we adopt the opinion of the circuit court, and accordingly its decree is affirmed.

FRY v. ROOKWOOD POTTERY CO. et al.

(Circuit Court, S. D. Ohio, W. D. December 2, 1898.)

No. 4,531.

1. PATENTS—SUIT FOR INFRINGEMENT—ESTOPPEL BY PLEA OF LICENSE.

A defendant is not estopped from denying the validity of the patent sued on by a plea of license, where such plea is withdrawn, before the hearing, by leave of court, and an answer filed in which a license is not pleaded.

2. SAME—INVENTION—PUBLIC HISTORY OF THE ART.

For the purpose of determining the question of invention, a patentee must be presumed to have had knowledge, at the time of the claimed in-

vention, of everything which was contained in printed publications or in the public history of the art.

3. SAME—TRANSFERRING APPLIANCE TO ANOTHER SIMILAR ART.

The art of painting on canvas or paper is so nearly allied to that of painting or decorating clay ware that no patentable invention is involved in transferring the use of an atomizer for applying pigments from one art to the other.

4. SAME—IMPROVEMENT IN ART OF DECORATING POTTERY WARE.

The Fry patent, No. 399,029, for an improvement in the art of decorating pottery ware, is void for want of patentable invention, and for anticipation, particularly by the "air brush" or atomizer for applying pigments to all surfaces, patented by Peeler and improved by Walkup.

This is a bill in equity, filed by Laura A. Fry against the Rookwood Pottery Company and William W. Taylor to restrain the defendants from an infringement of a patent for an improvement in the art of decorating pottery ware.

The defendants first filed a plea that they were acting under a license from the complainant. The plea was set down for argument, and then an amended plea was filed, the sufficiency of which was sustained by the court. Subsequently the defendants, by leave of court, withdrew their amended plea, and filed an answer, in which, admitting the issue of the patent, they denied that the complainant was the true or original inventor of the art of decorating pottery, and averred that the improvement had been described in printed publications prior to the alleged invention of the complainant, in a patent to Walkup, a patent to Peeler, in the "Life of Josiah Wedgwood," in the "History of the Ceramic Art," and in other publications; that the process had been known and in public use in this country prior to the complainant's alleged invention by Peeler, Walkup, Whipple, Carter, Ligowsky Clay Pigeon Company, the Matt Morgan Art Pottery Company of Cincinnati, and by the Cincinnati School of Design; and, finally, that the letters patent sued upon are invalid for want of patentable invention. The patent issued to the complainant was in the words following: "Be it known that I, Laura A. Fry, of Camp Dennison, in the county of Hamilton and state of Ohio, have invented a new and useful improvement in the art of decorating pottery ware; and I do hereby declare that the following is a full and exact description thereof: My invention consists in the application to the surface of the ware, after the article has received its final shape, and before it is finally glazed, or fired, suitable coloring matter in the form of a cloud or spray, as hereinafter described, whereby a particularly soft, delicate background or shading is produced upon the ware, which may be made to gradually fade or vanish in one or more directions, and to blend from one color to another without any perceptible line of demarkation. It consists, furthermore, in heating the ware when hard or glazed upon the surface, and thereafter applying the coloring matter, in manner as hereinafter described, to the hot surface, and finally firing or glazing the decorated article. To carry my invention into effect, the coloring matter is blown upon the surface of the ware—either in its soft state, in the 'bisque' state, or on the glaze before firing—in the form of a cloud, or an atomized spray or mist, produced by means of any of the usual forms of atomizers which are operated by an air blast or a steam blast, or by the lungs of the operator, and which, being well known, need not be herein described. After the ware has thus been decorated, the color is fixed by firing the ware in the customary manner. I employ the coloring matter either in a liquid or semiliquid form, or in the form of a very dry, almost impalpable powder, as desired. As the coloring matter is blown from the tube of the atomizer, and carried therefrom in a cloud of fine, almost imperceptible, particles, it may be readily directed upon the article in such manner as may be found best adapted to produce the desired effect, the application being freely made where the color is to be intense, and more delicately made in proportion as the color effect is to be delicate, or otherwise varied as the taste, skill, or ingenuity of the operator may dictate. A single color may thus be applied to a color ground, or different colors may be

applied separately, or, by means of separate atomizing jets, several colors may be applied simultaneously. By this process delicate clouding—if 'clouding' 't may be called—is produced entirely free from outline, and possessing a peculiarly delicate vanish, and where two colors merge a peculiar softness of blending is secured, which may not be otherwise attained. A variety of beautiful and novel effects may also be obtained, which it is not necessary herein to describe. The coloring matter and the glazing material for the clay ware may be mixed together, and applied to the article by my process, or the coloring matter may be applied as above described, and the glaze thereafter applied by the usual process of dipping and firing. Where the clay ware to be colored or decorated has been once fired, and is not, therefore, sufficiently absorbent, I heat the same before blowing the color thereon, the effect of the heat of the article being to cause the liquid coloring matter to quickly dry without marring the effects which are sought in its application. I am aware that coloring matter in a liquid state has heretofore been applied to the glazed surfaces of china ware by sprinkling or spattering the same thereon with the aid of a comb or brush, the comb being passed over the brush dipped in the coloring matter in such manner as to cause the latter to fly off in fine independent drops or particles, this process being technically known as 'spatter work,' and I make no claim thereto. My improved process differs from spatter work in that, instead of being spattered in small independent drops, the color is laid upon the ware in a cloud or sheet of almost imperceptible spray or mist, producing very different effects, and such have hitherto been unknown. I claim as my invention: (1) The improvement in the art of decorating articles of clay ware, which consists in blowing an atomizing spray or cloud of coloring matter upon the surface thereof, and thereafter fixing the same by firing, substantially in manner as described. (2) The improvement in the art of decorating clay ware, which consists in heating the surface, and blowing upon the heated surface an atomized spray or cloud of coloring matter, and thereafter fixing the same by firing, substantially in manner as described."

L. M. Hosea and W. H. Doolittle, for complainant.

R. H. Parkinson and George B. Parkinson, for respondents.

TAFT, Circuit Judge (after stating the facts as above). It is contended first that the plea by the defendants of license estops them from disputing the validity of the invention. However this might be were there a defense or plea of license before the court, the suggestion loses all its weight in view of the fact that the defendants did not stand upon their plea, but withdrew the same by leave of court, and filed an answer in which a license is not pleaded. It is conceded that the defendants only infringe the first claim of the patent, covering the application of color to the clay in its green state, before it is fired at all. Color is applied to pottery by the use of mineral pigments carried in a solution of clay. These are technically called "slips." The gist of Miss Fry's improvement was the spraying of these slips by the use of an atomizer upon the green clay molded into the desired form. Every other step in the process which she describes was old. The application of the color to the green clay before any firing was confessedly old in the making and decorating of the pottery. The only change claimed to have been effected was in the means by which the color was applied, to wit, by atomizing, rather than by a brush. The only question for the court to decide is whether in what had been done before there was a palpable suggestion of atomizing and spraying color upon pottery as a means of getting better effects in the decoration. It is to be borne in mind in determining such a question that the function of

the court is not to consider what Miss Fry's actual knowledge of the prior art was, and then to decide whether, with such knowledge, what she did involved real invention; but the court is bound to assume that she knew everything about the art of applying color to pottery or kindred surfaces which was contained in printed publications or in the public history of the art, and upon that assumption to say whether the step she took in the art required the exercise of the inventive faculty. Approaching the question, thus limited, we find that in the Chinese method of decorating pottery, it had been common to blow upon the articles to be decorated, in the green clay, the color through a bamboo pipe having stretched across the end of it a piece of gauze or other material for dividing the pigment into fine particles, and thereby produce a spraying effect. Two pieces of pottery thus decorated have been exhibited to the court. It was old to use a mouth atomizer in blowing upon paintings shellac or other fixative necessary to preserve them. It was old to use the same process with charcoal sketches. In this condition of the art, Abner Peeler, on October 1, 1881,—three years before Miss Fry claims to have conceived her invention,—applied for a patent for a paint distributor, and the patent was issued to him on April 25, 1882. He says, in his specifications:

"My invention relates to an improvement in devices for distributing pigments, the object being to apply to surfaces of any character all kinds of liquid coloring matter in a state of extreme attenuation. With this end in view, my invention consists in the combination, with a reciprocating needle arranged and adapted to feed a quantity of liquid pigment to its point at every stroke, of devices for projecting a jet of air against the needle, and atomizing the liquid pigment."

It is unnecessary further to describe the mechanism of the invention than to say that it consisted of an ordinary atomizer with devices for holding the pigment and increasing the atomization by the assistance of a reciprocating needle which presented the pigment in fine drops at the mouth of the atomizer. It was merely an improvement on an ordinary atomizer. The patentee, in describing the operation, said:

"In the reciprocating movement of the needle its point is drawn within and immersed in the pigment in the receptacle, a small quantity of which will adhere to it. When, now, the needle is thrown forward, its point will divide the air jet issuing from the pipe, D, and the adhering color will be blown from its opposite sides thereby, and carried to any object within convenient range of the jet. The quantity of color adhering to the needle is so small, and its atomization so perfect, that the individual particles of color are hardly discernible upon the object on which they are thrown. It will therefore follow that with my distributor and with one pigment colored effects may be produced which will descend from the palest tints capable of being produced by the extreme attenuation of the color through all of the intermediate tints down to the depth of color formed by the paint in mass. As the tone of the different effects will depend upon the length of time that the jet is directed to any one point, exquisitely graded shading may be produced by its careful manipulation. In polychromatic painting, in the prosecution of which it is often necessary, in order to obtain the desired tints, to apply one pigment upon the surface of another color, my distributor will be of great value, as, after it has been used to apply one color, the pigment receptacle may be cleansed, and another color introduced into it, and distributed upon the color first applied. In this way a blending of color may be produced, almost unattainable in brush painting. In painting portraits, either in color or in sepia, and in finishing solar prints, the device may also be used to excellent

purpose on account of its adaptation to produce those soft and delicate tints which this class of work demands. In fact, in all situations requiring delicate coloring my device will be found a great aid in the application thereof."

This patent was assigned to Liberty Walkup, to whom was issued another patent for a device which is merely an improvement upon Peeler's paint distributor. Like Peeler's, it is a device for distribution by atomization of pigments in the art of painting. He says in his patent: "This invention relates to machines employed in the distribution of pigments in the art of painting, but more especially in the fine arts." Walkup, since 1883 and 1884 down to the present time, has been engaged in the manufacture of a device made according to the Walkup and Peeler patents, that he called an "air brush," to be used for the distribution of color over surfaces of all kinds. In his advertisement issued in 1883—a year before Miss Fry conceived her improvement—Walkup said that the air brush would handle liquid pigments on any surface known to the art, and that it would handle any liquid pigment in a satisfactory manner; that it could be applied to "India ink work, water colors, crayon work, photography, pastel work, architecture, lithographing, civil engineering, monumental drawing, designing of house decorations, drapery and costume designing, china decorating, colored photographs, artotypes, photogravures," etc. There is uncontradicted evidence that in 1883 Mrs. Walkup, the wife of the inventor, used the air brush to decorate china which was subsequently fired, and that three pieces of china were thus decorated to show that the brush was adapted to the work. It is contended that the Peeler and Walkup patents cannot be successfully used with the heavy slip coloring matter that is used to decorate pottery. This is contradicted. It is not material, however, whether the particular form of atomizer used by Peeler and Walkup would distribute with sufficient ease the heavier coloring material used in pottery decoration, because the change from Walkup's invention to the common form of atomizer was palpable. Walkup's atomizer was merely an improvement on the common form, and was invented only to make the spray finer than the ordinary atomizer would make it. Walkup's patented device necessarily contained the obvious suggestion that an ordinary atomizer would accomplish the same result in a less degree. It is to be noted that Miss Fry does not mention in the specifications of her patent any particular form of atomizer. It appears that she herself used the ordinary mouth atomizer when she began this method of coloring at the Rookwood Pottery, but that afterwards, because the use of this form of atomizer was disagreeable and harmful to the throats of the designers and artists of the Rookwood Pottery, air pumps and other mechanical devices were applied to the working of atomizers under direction of Mr. Taylor, the manager of the pottery. The advantages to be derived from atomization and spraying of coloring matter on surfaces to be decorated were fully set forth in Peeler and Walkup's patents and in the advertisements of Walkup long before Miss Fry attempted the use of an atomizer. The particular form of atomizer to be used with the heavier pigments was a matter of detail and mechanical skill, for which no patent can be supported. It appears that the mouth atomizer for distributing and spraying color on clay was adopted by a number of persons who were entirely ignorant of Miss

Fry's use of an atomizer for such a purpose at or about the same time that she began its use. It is clearly established that Matt Daly used the atomizer for the distribution of coloring matter upon pottery about the same time as Miss Fry; that Ligowsky, an inventor of many patents, also used the same method of distributing coloring matter; and that W. A. Long, a witness for Miss Fry in this case, after having experimented with the Walkup air brush, and finding it hardly adapted for the distribution of such heavy coloring matter as the slips, began at once to use the mouth atomizer. It is not a matter of importance whether these uses of the atomizer were anterior to or after Miss Fry's use of the same device. They are not referred to as prior uses, but they are material because they tend to show that, after Walkup's device became known, the use of an ordinary atomizer for color slips was merely a plain and obvious step, which involved no patentable invention. A well-authenticated instance of the use of atomizers in applying slip colors to terra cotta work at the Northwestern Terra Cotta Works in Chicago some time prior to Miss Fry's conception of the method appears in the evidence, and a plaque of Sarah Bernhardt thus colored some time before July, 1884, the earliest date fixed by Miss Fry of her conception of her improvement, has been produced in court. On the whole case, I have no doubt that Miss Fry's patent is void for want of invention. Even if Walkup's patent had been limited—as it was not—to the application of pigments to canvas and paper, the art of painting on those surfaces is so nearly allied to painting or decorating clay that it would have involved no invention to transfer the use of the atomizer from one art to the other. This principle was applied in *Frederick R. Stearns & Co. v. Russell*, 54 U. S. App. 591, 29 C. C. A. 121, and 85 Fed. 218, and *Steiner Fire Extinguisher Co. v. City of Adrian*, 16 U. S. App. 409, 8 C. C. A. 44, and 59 Fed. 132, decisions by the circuit court of appeals of this circuit, and in the cases cited in those decisions. It is hardly correct to say that painting on clay is an art distinct from painting on other surfaces, so far as the mechanical method of applying the color is concerned. Walkup's patent was for the means of applying pigments to all kinds of surfaces, and the use of the atomizer to apply pigments to clay only is a case "of applying what was on its face expressly intended for all arts to a special art for which it was peculiarly adapted." *Palmer v. Manufacturing Co.*, 84 Fed. 454, 457. It is doubtless true that part of the artistic excellence of the Rookwood Pottery ware is due to the delicate shading and blending of colors produced by the use of the atomizer in distributing the slips. Under the circumstances, however, I do not see that this reflects on the question of the novelty of Miss Fry's improvement.

It appears from the evidence that Miss Fry first used an atomizer upon clay in her work as designer in the Rookwood Pottery, and that its success as a means of applying color was there developed with the materials and appliances of the Rookwood Pottery. She does not seem to have thought that she had invented or discovered anything patentable in the use of the atomizer for this purpose until Mr. Taylor, manager of the Rookwood Pottery, nearly two years after she began using it, and after she had left the employ of that pottery, wrote to her, and suggested that she take out a patent for the process. In the course of

the correspondence he said that it was doubtful whether the process was patentable in view of the Walkup patent, but that, if it could be obtained, it would be useful for the pottery to hold such a patent as an obstacle to dishonorable competition by former employés, from which the pottery had already suffered. He proposed, on behalf of the pottery, to pay all the expenses of procuring the patent. Miss Fry, because of her gratitude to Mrs. Storer, then the owner of the pottery, professed entire willingness to have the process patented, and to let the pottery have it, if she could be permitted to use the process herself. When, however, subsequently, Miss Fry was asked to sign the application for the patent, and a paper assigning her interest in the improvement for a nominal consideration to Mr. Taylor for the pottery, she declined to do so, and soon after applied for a patent through counsel employed by her in New York. Correspondence ensued, in which there was some discussion as to what would be a fair consideration for the assignment to the pottery of such an interest in the patent as would give it the right to exclude its competitors from using the process, but the parties were unable to reach an agreement. Miss Fry did not in any of the letters express a wish or claim that the pottery should pay for its own use of the process. There is nothing in all of this to estop Mr. Taylor or the Rookwood Pottery from impeaching the validity of the patent issued to Miss Fry, though there is much upon which it might be claimed, had the question been properly made in the pleadings, and were the patent a valid one, that a license from Miss Fry to the Rookwood Pottery to use her patented process must be implied. *Solomons v. U. S.*, 137 U. S. 342, 346, 11 Sup. Ct. 88; *McClurg v. Kingsland*, 1 How. 202; *Lane & Bodley Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. 78; *McAleer v. U. S.*, 150 U. S. 424, 14 Sup. Ct. 160. The bill is dismissed.

KING et al. v. ANDERSON et al.

(Circuit Court, S. D. New York. December 5, 1898.)

1. PATENTS—PATENTABILITY—SUBSTITUTION OF MATERIALS.

Liquid or pasty materials used to restrain the too-rapid setting of plaster of Paris being old, and the use of powdered marble in a dry state being also known, *held*, that it involved patentable invention to substitute for these materials hydrate of lime in a dry state, to be mixed with the dry plaster of Paris; the difference between the results accomplished being that between a partial and complete success.

2. SAME—INFRINGEMENT.

Infringement is a tort, which must be proved, and cannot rest wholly on conjecture and inference. The fact that a defendant occupied the same office as another whose infringement is proved is insufficient.

3. SAME—COMPOUND TO RESTRAIN THE SETTING OF PLASTER.

The King patent, No. 397,296, for an improvement in compounds to restrain the setting of plaster, *held* not anticipated, valid, and infringed.

This is a suit in equity by J. Berre King and George R. King against R. Napier Anderson and Enos A. Bronson for infringement of a patent.

Charles E. Mitchell, for complainants.

A. Bell Malcomson and Carl A. De Gersdorff, for defendants.

COXE, District Judge. This is an equity suit for the infringement of letters patent, No. 397,296, granted to George R. King, February 5, 1889, for an improvement in compounds to restrain the setting of plaster. The patent is now owned by complainants. The specification points out that it is very desirable to restrain the natural tendency of plaster of Paris and similar materials to set too quickly. To accomplish this result the patentee grinds dry hydrated lime to a powder and mixes it with the restraining substance—preferably glue—dissolved in water, thus forming a pasty mass. For ordinary purposes four pounds of glue may be dissolved in a pailful of water, but more or less of the restraining material may be used according to the desire to make the product strong or weak. The pasty mass is dried and becomes a dry cake or crust-like substance, which, on being ground, produces the powdered “restrainer” ready for use. It is used by being added to the plaster or like material in any desired quantity. The patent contains two claims which are as follows:

“(1) The above-described composition of matter, composed, essentially, of animal gelatinous or vegetable glutinous matter and hydrated lime, substantially as set forth. (2) The above-described composition of matter, composed, essentially, of animal gelatinous or vegetable glutinous matter and hydrated lime combined and reduced to a finely divided condition, substantially as set forth.”

In brief, the claims cover the dry product obtained by mixing pulverized hydrated lime with dissolved glue. The first claim covers the product in any form, the second when reduced to a powder.

The defenses are anticipation, lack of patentable novelty and failure to prove infringement.

It is asserted that, prior to the patent, walls covered with plaster, composed of calcined gypsum and water, would “set” and harden within a few minutes after the water was added, thus preventing further and necessary manipulation by the mason. The inconvenience of this quick setting action of the plaster had long been recognized and for many years the attention of those skilled in the art had been directed to the discovery of some means to prevent it. It will avoid confusion if it be constantly borne in mind that the claims do not cover a process but a product consisting of a dry crust-like or powdered compound capable of being mixed with powdered plaster of Paris, also in a dry state, so that the plaster can be used from the “scratch” coat to the finishing coat of walls and ceilings. Was this product found in the prior art? A statement of what was known before may be summarized as follows:

First. The use of glue as a restrainer was familiar to masons and had been so used in various combinations. “Lime putty,” made of slaked lime and water, was formed in a ring on the mortar board. Into this ring water was poured and also a small quantity of strong glue solution forming a miniature pond. The plaster of Paris was then added by being gradually stirred into the water of the pond, until all the ingredients, including the lime putty, became a plastic mass ready for use. This method of restraining the rapid setting of plaster by means of hydrated lime and glue thus combined was used long prior to the patent and is successfully used at the present time.

Second. In April, 1883, a patent was granted to Joel H. Sharpless for a "lime-wash for coating buildings." The object of the patentee was to provide a cheap wash of any desired color for buildings and fences, one that is ready for use by adding a small quantity of water and one that will not scale or rub off. The claim is for "a plastic composition, for lime-washes consisting of pulverized lime and having mixed therewith glue and coloring matter." This compound is preserved in a pasty condition by being hermetically sealed in cans. When used it is taken from the cans and converted into a paint or wash by the addition of water. "This solution of glue," says the patent, "acts as a binder and causes the wash to adhere firmly to the building; while at the same time it imparts a slight gloss to the wash and prevents the same from scaling or rubbing off." In short, the patentee had in view an improved whitewash.

Third. Two years after the Sharpless patent. April, 1885, a patent was granted to George L. Gregory for a plaster compound to be used for "brown-coat" work. The patentee had in mind several existing disadvantages which his compound was intended to cure, among them "too rapid setting." He says,

"To overcome these disadvantages I add lime and hair to the ground and calcined gypsum, and to retard the setting of the compound I use a smaller amount of common glue * * * than has been found necessary in other plaster compounds in which gypsum * * * is an ingredient."

The lime and glue are placed in a box and reduced, by water being added, to the consistency of sweet milk. The wet and washed hair is then added and thoroughly mixed with liquid glue and lime. Next sand is placed in a box, the desired proportion of ground and calcined gypsum is added and the two are mixed in a dry condition. The lime-glue-hair liquid is then added with water sufficient to make the compound of the consistency of plastering mortar. The lime is used to facilitate an even mixing and make a compound on which a finishing coat can easily be put. The claims are two, covering the process and the product. The latter is described as "a partially-liquid compound for a foundation coat of plastering."

Fourth. In August, 1887, a patent was granted to George R. King, the patentee of the patent in suit, for a compound to restrain the setting of plaster. Here was the genesis of the dry restrainer. The specification describes a process very similar to that of the patent in suit. It says,

"I take any stone or stone-like material—such as marble, chalk, plaster, or the like (preferably white marble)—and I powder it so that it will pass through, say, a No. 16 bolting cloth."

The stone powder is mixed with glue water to form a pasty mass which is dried, the result being a comparatively hard stone-like mass which is subsequently reduced to powder and produces the restrainer ready for use. The patent contains four claims, the first three covering the process and the last covering the product. The fourth claim is as follows:

"As a new article of manufacture, a restrainer, substantially as herein described, consisting of glue and ground stone, combined in the manner set forth."

These are substantially all of the references relied on to invalidate the complainants' patent.

It will be noted at the outset that King was the first to produce a restrainer in the form of a dry powder to be mixed with dry plaster of Paris. He first evolved the idea in the 1887 patent and afterwards improved and perfected it in the patent at bar. Prior to this the restrainer had been in a liquid or pasty form. It is clear that Sharpless in producing his improved whitewash was working on different lines and intended to accomplish entirely different results. He used glue not as a restrainer but as a binder and to add a gloss to his paint. He was not dealing with plaster and was not vexed with its propensity to set too quickly. His hermetically sealed paste was never used as a retarder and it is by no means clear that it could be so used with any hope of practical success. It is argued by the defendants that if more glue were added and the paste allowed to dry it would be the product of the King patent. The presence of the "if" destroys the argument. But assuming that the Sharpless paste was capable of being used as a restrainer there was still room for patentability in the transformation to a dry powder. In *Electrical Accumulator Co. v. Julien Electric Co.*, 38 Fed. 117, the prior art showed that the active layer had been applied to the electrodes of secondary batteries in the form of a fine dry powder. The patent was for an electrode to which the active layer was applied in the form "of a paint, paste, or cement." Invention of a high order was found to reside in the improved method. Reverse the situation here. If it be invention to substitute paste for powder in the Julien Case why is it not invention to substitute powder for paste in the present case? The improvement, considering the limitations of the plasterer's art, is quite as marked. No one thought of the change prior to King, and that it produces better results, for many purposes, is clearly established by the proof. Gregory's compound, too, was in a partially liquid state and was intended only for the "brown" or foundation coat. It contains six ingredients, namely, ground and calcined gypsum, sand, fresh-slaked lime, hair, water and glue. Surely this is not the material of the patent in suit. No one pretends that the Gregory compound, if made for the first time to-day, would infringe the claims of King's patent; and it is thought that there is nothing in the Gregory patent to suggest to the skilled artisan the dry product of King. Gregory, probably, produced a satisfactory "brown" coat with glue as a restrainer. This had been done many times by others employing methods differing from his in some essential and several nonessential features, but neither Gregory nor any one else had in mind a dry crust-like or powdered retainer capable of being mixed dry and used at any time.

If the controversy ended here there can be little doubt that the complainants should succeed. The vital point in the case, in the opinion of the court, is the one suggested at the argument, whether in view of the King patent of 1887, there was room for the King patent of 1889? A fair statement of the former patent is that its product is the same as that of the latter with the exception that hydrated lime is substituted for powdered marble or other similar material. Powdered marble produces a hard stone-like mass; hydrated lime produces

a friable, crust-like cake, which submits readily to the action of water and can be pulverized with the greatest ease. A restrainer thus made is better calculated to mix evenly with the plaster and its action is more uniform, prompt and reliable. In short, the difference between the composition of the two patents seems to be the difference between a partial and a complete success. The commercial and practical advantage of the 1889 product is proved by the testimony of masons and builders and its large and constantly increasing sales. It is hardly too much to say that it was the first actual commercial success. The result may not have been broadly new, but that it is a better result produced in a better way is beyond question. It is true that a harsh interpretation of the 1887 patent can convert it into an anticipation, but there is no imperative reason for this illiberalism. If such an interpretation be sanctioned by the court the patentee will be impaled upon a sharp construction of heedlessly selected words and destroyed by his own verbiage—the Actæon of the patent law. If it can be avoided, this should not be. It is plain that it is the use of hydrated lime which makes the restrainer successful; it is plain that its use had not occurred to the patentee in 1887, for if it had he would have used it in preference to the comparatively worthless pulverized stone. The expression “stone-like material” may include hydrated lime, but not necessarily so; indeed, it is a strained construction to include within the term “stone-like” the soft, amorphous, artificial substance with which the later patent deals. “Limestone” would be within the earlier patent, “lime” might be, but “hydrated lime” cannot be found there unless the patent is seen through unfriendly eyes. The direction to use white marble does not suggest the use of hydrated lime any more than a direction to use wood suggests the use of ashes. Hydrated lime is, indeed, one step further removed from marble than ashes is from wood. The improvement over the earlier patent is marked, and even though it be an improvement only, so that the 1889 restrainer infringes the 1887 patent, there is still room for invention. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970. The finding of a material which produces a new or improved result, even though found by a process of exclusion, may support a patent. *Celluloid Mfg. Co. v. American Zylonite Co.*, 35 Fed. 301. That the mere substitution of one material for another having the same general characteristics, is not invention has been affirmed by the supreme court in a long series of authorities from *Hotchkiss v. Greenwood*, 11 How. 248, to *Brown v. District of Columbia*, 130 U. S. 87, 9 Sup. Ct. 437. It will be found, however, on analysis, that they all deal with substitutions which were simple and obvious, involving no novelty in construction or anything substantially new in the resulting product. In each case the adaptability of the substituted material to do the work of the old material was apparent to the most inexperienced tyro; for example, iron for wood in a wagon reach, wood for metal or gutta-percha in chair seats, etc. On the other hand, the courts have said with the same unanimity that invention is involved where the substituted material possessed new and, theretofore, unknown properties which produce better results and save time, labor and money. In *Celluloid Mfg. Co. v. Frederick Crane Chemical Co.*, 36 Fed. 110, Mr. Justice Bradley says,

"There is no rule of law that the substitution of one material for another is not patentable. In processes of manufacture, and in compositions of matter, such a substitution often effects material changes in the result either as to the product or the expense."

In *Smith v. Vulcanite Co.*, 93 U. S. 486, the court, at page 494, say, of the invention,

"It is evident that this is much more than employing hard rubber to perform the functions that had been performed by other materials, such as gold, silver, tin, platinum, or gutta-percha. A new product was the result, differing from all that had preceded it, not merely in degree of usefulness and excellence, but differing in kind, having new uses and properties. * * * We cannot resist the conviction that devising and forming such a manufacture by such a process and of such materials was invention. More was needed for it than simply mechanical judgment and good taste. * * * The case of *Hotchkiss v. Greenwood*, 11 How. 248, does not decide that no use of one material in lieu of another in the formation of a manufacture can, in any case, amount to invention, or be the subject of a patent. If such a substitution involves a new mode of construction, or develops new uses and properties of the article formed, it may amount to invention. * * * The result may be the production of an analogous but substantially different manufacture. * * * If the result of the substitution was a new, a better, or a cheaper article, the introduction of the substituted material into an old process was patentable as an invention. * * * These cases rest on the fact that a superior product has been the result of the substitution,—a product that has new capabilities and that performs new functions."

To the same effect are *Magowan v. Packing Co.*, 141 U. S. 332, 12 Sup. Ct. 71; *Wood-Finishing Co. v. Hooper*, 5 Fed. 63; *Dalton v. Nelson*, 13 Blatchf. 357, Fed. Cas. No. 3,549; *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194; *Edison Electric Light Co. v. United States Electric Lighting Co.*, 3 C. C. A. 83, 52 Fed. 300; *Perkins v. Lumber Co.*, 51 Fed. 286, 291.

As to the defendant Bronson infringement is established beyond a serious doubt. He was dealing in a restrainer having all the characteristics of the patented material. A sample of this restrainer was obtained at the defendant's place of business together with a circular evidently prepared by him. This circular has Bronson's name printed thereon as manager of the "Peerless Restrainer Works," and enumerates the merits of the restrainer which he offers to the public. The circular was "dictated by E. A. B." The sample was in the form of a dry powder, and when analyzed was found to contain the ingredients of the patented product. That it contained other nonessential ingredients is immaterial.

Regarding the defendant Anderson the proof of infringement is wholly insufficient. Bronson occupied Anderson's office at No. 63 Fifth avenue, and the latter at one time went so far as to investigate the value of the restrainer with a view to placing his son in the business. The report of the plasterer with whom he consulted being adverse to the plan, it was abandoned and his interest in the matter ceased, except that he helped Bronson to prepare a circular and assisted him in writing a few letters. Infringement is predicated solely of these acts. Proof that Anderson either made, used or sold the "Peerless Restrainer" is wholly absent. The argument for the complainants is based upon suspicion and inferences drawn from the fact that the two defendants occupied the same office. But infringement is a tort which

must be proved, it cannot rest wholly on conjecture. *Electric Light Co. v. Kaelber*, 76 Fed. 804. One may occupy the same room, or, indeed the same bed, with an infringer, and yet not be guilty of infringement. Infringement is not contagious. As to Anderson the bill must be dismissed, and as no good reason is discovered for making him a defendant it must be dismissed with costs.

The complainants are entitled to a decree for an injunction and an accounting against the defendant Bronson, with costs.

THE DEL NORTE.

(District Court, D. Washington, N. D. November 29, 1898.)

1. MARITIME LIENS—STATE STATUTE—WORK OR MATERIALS FURNISHED CHARTERER.

The effect of the statute of Washington (2 Ballinger's Ann. Codes & St. § 5953; 1 Hill's Code, § 1678) which makes every contractor, subcontractor, builder, or person having charge in whole or in part of the construction, alteration, repair, or equipment of a vessel an agent of the owner for the purpose of contracting debts on the credit of the vessel, is to relieve persons who extend credit for work done or material furnished in that state for the alteration, repair, or equipment of a vessel, at the instance of a charterer having possession, from the necessity of making inquiry as to the authority given by the charter party; and, unless they have actual knowledge of its provisions, their right to hold the vessel liable is not affected thereby.

2. SAME—VALIDITY OF STATE STATUTE—VESSELS ENGAGED IN INTERSTATE OR FOREIGN COMMERCE.

Local statutes subjecting vessels to liens for debts contracted in equipping and fitting them for service are not regarded as amendments of the general maritime law, and, in the absence of legislation by congress establishing a uniform rule, are upheld as applied to vessels engaged in interstate or foreign commerce, and owned in other states, as being in aid of commerce, by enabling such vessels to obtain credit for necessities when away from their home port.

John E. Humphries, for libelants.

L. C. Gilman, for claimant.

Clarence S. Preston, J. H. Powell, C. E. Remsberg, and J. B. Metcalf, for interveners.

HANFORD, District Judge. The steamship *Del Norte*, of San Francisco, having been chartered by her owner, a corporation of California, to the Seattle & Alaska Transportation Company, a corporation of the state of Washington, was brought to Seattle to engage in the transportation of passengers and freight between Seattle and ports in Alaska; and, while at Seattle, the charterer caused additional structures of a temporary character to be put on her deck, so as to fit the vessel for carrying live stock, and furnish additional accommodations for passengers, and purchased supplies and materials necessary for the equipment of the vessel. The bills for said supplies, materials, and work have not been paid, and these suits are being prosecuted in rem by the suppliers, material men, and workmen, to enforce liens against the vessel which they claim for the amounts due to them respectively. The crew of the

vessel have also filed intervening libels for their wages earned in operating the vessel while she was under charter, as aforesaid.

I find no defense to the claims for wages of the members of the crew, and I therefore award to them the amounts shown by the pay roll introduced in evidence.

The liens claimed by the other creditors have no basis to rest upon in the general maritime law, for the reason that there is no express contract by which the owner of the vessel agreed that credit should be given to the ship, and, except repairs amounting in value to only a few dollars, the master of the vessel did not authorize or consent to the pledging of the vessel as security for these debts. The claims, however, are founded upon a statute of this state, which provides as follows:

"All steamers, vessels, and boats, their tackle, apparel and furniture, are liable: (1) For services rendered on board at the request of or on contract with their respective owners, masters, agents, or consignees; (2) for supplies furnished in this state for their use, at the request of their respective owners, masters, agents, or consignees; (3) for work done or material furnished in this state, for their construction, repair, or equipment, *at the request of their respective owners, masters, agents, consignees, contractors, sub-contractors, or other person or persons having charge in whole or in part of their construction, alteration, repair, or equipment; and every contractor, sub-contractor, builder, or person having charge, either in whole or in part, of the construction, alteration, repair, or equipment of any vessel shall be held to be the agent of the owner, for the purposes of this chapter.*" 2 Ballinger's Ann. Codes & St. § 5953 (1 Hill's Code, § 1678.)

It is expressly provided in the charter party that the charterer should pay all expenses incident to the operation of the vessel while in its service. I am unable to find from the evidence that the creditors knew of this condition in the charter party; but the owner, in resisting these claims, insists that, if they had exercised ordinary care and prudence as business men, they could have obtained true information as to the ownership of the vessel, and the terms and conditions under which the charterer obtained possession of her, and that the knowledge of want of authority in the charterer to incur debts upon the credit of the vessel with which they are legally chargeable precludes them from asserting liens upon the vessel.

In July, 1881, the supreme court of Washington territory gave its decision in the case of *The Daisy*, 2 Wash. T. 76, 3 Pac. 616, holding that the territorial statute then in force (Laws 1877, p. 216) did not give a lien for machinery put into a steamer at the request of a contractor; and, to cure what was considered to be a defect in the law, the legislature, at the session held in the winter of 1881, revised and amended the lien law. The amendment, so far as it is material to be now considered, consists in the addition, to the section above quoted, of the part which is printed in italics. The amendment is important, for, in view of the decision in the *Daisy Case*, it is manifest that the legislature intended to make a radical change in the law. As amended, the statute makes every contractor, subcontractor, builder, or person having charge, either in whole or in part, of the construction, alteration, repair, or equipment of any vessel, an agent of the owner for the purpose of contracting debts upon the credit of the vessel. The evident intent was to protect merchants and mechanics who should thereafter extend credit to vessels for supplies, repairs, and equipments, against technical de-

fenses on the part of owners who permit others to be in charge of the equipment or repairing of their vessels. The effect of the law is to relieve this class of creditors from the necessity of making particular inquiry as to the position or authority of persons having possession of vessels, and in charge of their equipment or of repairs being made thereon. The charter party was not made accessible to the public by being filed or recorded in any public office, and there is no evidence in the case tending to prove that the owner made any endeavor to apprise the public or these creditors of the existence of any agreement by which creditors would be deprived of the right which the statute gives to regard the charterer as agent of the owner while having charge of the equipment of the vessel and her preparation for a voyage.

I fully assent to the doctrine laid down in the decision of the supreme court in the case of *The Kate*, 164 U. S. 458-471, 17 Sup. Ct. 135. I understand the rule given in that decision to be that a statute similar to the one under consideration, when reasonably construed, "does not assume to give a lien where supplies are furnished to a foreign vessel upon the order of the charterer, with knowledge upon the part of the person or corporation furnishing them that the charterer does not represent the owner, but, by the contract with them, has undertaken to furnish such supplies at his own cost." But in this case the evidence fails to show that the creditors did have actual knowledge of such an agreement on the part of the charterer; and, for the reasons above stated, I hold that they were not bound to make inquiries, and therefore are not chargeable with constructive notice of the conditions of the agreement under which the charterer obtained possession of the vessel.

The owner denies the power of the legislature to subject vessels which are instruments of interstate and foreign commerce, and owned by nonresidents of the state, to liability and burdens more onerous than the general maritime law imposes. After due deliberation and weighing the arguments and authorities cited, I have reached the conclusion that the statute itself does not admit of discrimination, in the sense that its application is to be limited to domestic vessels, and no provision of the constitution of the United States or the constitution of the state of Washington prohibits the exercise of legislative power to the extent of subjecting vessels, even while engaged in interstate and foreign trade, to liens as security for debts contracted by a person in charge for supplies and materials furnished to them, and work done necessary to equip and prepare them for service. The rule is general that questions as to the validity of contracts, and the interpretation to be given to them, must be determined according to the *lex loci contractus*; and this is applied in commercial transactions as well as in all matters of dealing between individuals residing in different states. Although the supreme court of the United States appears, by its decision in the case of *The Kate*, to have avoided discussion of this question, the tendency of its decisions has been to uphold the statutes of the different states creating liens upon ships and vessels, for the security of creditors who furnish supplies and materials and do work upon them, and has encouraged such legislation by enforcing liens so created in all cases within the admiralty jurisdiction of federal courts. Local statutes, subjecting vessels to liens for the amount of unpaid bills contracted in equipping

and fitting them for service, have not been regarded as amendments of the general maritime law, but as strictly local laws, valid only so long as the congress of the United States shall refrain from exercising its power to enact a general law establishing a uniform rule throughout the whole country. *The Lottawanna*, 21 Wall. 558-563. Laws which enable vessels to obtain credit for necessities when away from their home ports have always been considered as being favorable to commerce.

In *The St. Jago de Cuba*, 9 Wheat. 409-416, Mr. Justice Johnson, speaking of the lien of material men and other implied liens under maritime contracts, said:

"The whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to the vessel, to get back for the benefit of all concerned; that is, to complete her voyage."

The idea that a state law made to secure payment to its citizens of what is due to them for supplies furnished to and work upon foreign ships, in outfitting and preparing them for intended voyages, can be an unreasonable burden laid upon commerce, is contrary to the views which have heretofore governed the decisions of the courts in this country generally. The owner who lets his ship to be taken by a charterer away from her home port cannot reasonably complain if the vessel is held for nonpayment of her expenses. He knows what may happen to a ship in a foreign port, and he may protect himself against loss by exacting indemnity before giving possession to the charterer. That is just what the owner of the *Del Norte* did, for I find attached to the charter party which the claimant introduced in evidence a "Contract of Guaranty," in which the individuals who signed it promised and agreed that the Seattle & Alaska Transportation Company "will keep and perform all the covenants and conditions thereof on its part to be kept and performed on its behalf; and, should default be made in the payment of said several amounts, we will forthwith pay the same on demand, and will further pay to the said party of the first part any and all damages it may sustain by reason of the failure of said party of the second part to keep and perform any of said covenants and conditions. It being the intent and purpose of this guaranty to indemnify and save harmless the said party of the first part from any and all damages which it may sustain should said party of the second part make default in any of its undertakings, covenants, or agreements in said charter contained." The claimant acted prudently in taking this indemnity contract, and it does not appear to me that there is any merit in the argument advanced that the construction which I have given to the lien law of this state enables charterers to conspire with merchants and others to swindle shipowners by the creation of liens.

The amount of the bills is disputed, but they are supported by testimony, and there is no evidence on the part of the claimant to impeach them, except in the case of the intervenor Percy G. Copp. Upon his own showing, I think that, after deducting credits, the sum of \$200 is the most that can be fairly awarded as the balance due to said intervenor. That amount, and half costs, will be decreed in his favor, and each of the other intervenors and libelants will recover the amounts sued for.

THE E. V. McCAULLEY.

THE IVANHOE.

(Circuit Court of Appeals, Third Circuit. December 2, 1898.)

1. TOWAGE—LOSS OF TOW—NEGLIGENCE OF TUG—RELIANCE ON WEATHER SIGNALS.

The captains of tugs who remained in harbor with their tow during a storm lasting several days were not negligent in relying on the government weather signals, and putting to sea after the storm had abated and the signals had been changed to indicate fair weather and favorable winds, merely because the wind had "backed around" from the northeast to west of north.

2. SAME—INSUFFICIENCY OF HAWSER.

Tugs engaged in towing a dock at sea cannot be held liable for its loss during a storm, on the ground of the insufficient strength of the hawser used, where it appears the loss is in no way attributable thereto.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel by Rilatt Bros. against the tugs E. V. McCaulley and Ivanhoe for the loss of a tow. The district court dismissed the libel (84 Fed. 500), and the libelants appeal.

Edward F. Pugh and Henry Flanders, for appellants.

John F. Lewis, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

KIRKPATRICK, District Judge. The tugboats E. V. McCaulley and Ivanhoe were employed to tow a dock belonging to the libelants from the port of New York to Philadelphia. The dock was to be prepared for the voyage by the owners, and when ready the tugs were to furnish the necessary hawser for the towing, and start upon the voyage at the first favorable opportunity. The tugs reached New York on Monday, October 28th. On the following day an easterly storm set in, which continued until early Friday morning, when the weather cleared and the wind went to the northwest. About 11 o'clock Friday morning the tugs started with the dock in tow, and on Saturday, about 10 o'clock in the morning, when off Barnegat light, the dock was lost in a storm. The charge of the libelants is that the tugs are responsible for the loss, because it was entirely due to their carelessness or negligent conduct. Three charges of negligence are urged upon our consideration,—the first relates to the commencement of the voyage, the second to its continuance, and the third to the improper means employed to do the towing.

As to the first charge, the libelants say that the tugs were guilty of negligence in taking the dock outside of the shelter of Sandy Hook when they did, because the indications at that time were that the weather was not "settled," and a recurrence of the storm was probable before the tow could reach its destination. In support of this allegation they offer the testimony of Mr. Griffin, who says that the wind on Friday morning "backed around" from northeast to northwest, and

cite the case of *The Vandercook*, 65 Fed. 251, as an authority to establish the rule that this is an indication of the temporary nature of good weather. True it is that the court did say that, from the evidence produced in that case, it appeared "that when the wind backs from the northeast to westward of north it is likely to return to the eastward before many hours," but the *Vandercook* was held to be in fault, not from this circumstance alone, but because, before the start had been made, the wind was blowing from the eastward, and because other captains similarly situated with tows did not consider it a prudent thing to do. The evidence in the case at bar is that on Friday morning, when the tugs started with the dock, the weather had cleared, the sea was smooth, and the wind was blowing gently from the northeast. When the tugs and dock reached Sandy Hook, between 2 and 3 o'clock Friday afternoon, it was observed that the government weather signals had been changed; those predicting fair weather and winds favorable for vessels to leave port having been substituted for those telling of the probable continuance of the storm. Many vessels which had sought shelter in Princes Bay had proceeded or were proceeding upon their voyages, because, as the masters who were called as witnesses testified, they believed the storm had spent itself. Under these circumstances, we do not feel justified in finding the tugs guilty of carelessness, even though it be a fact that the wind "backed around" by the northward. The captains of the tugs had no interest in putting to sea in the face of a storm. They, no doubt, would have preferred a safe anchorage in the bay to the risk of encountering an easterly storm off the notoriously dangerous New Jersey coast. They may be presumed to have exercised their best judgment, which, when fortified by that of others in the like situation and confirmed by the predictions of those whom the government employs to gather information and give to seamen the benefit of their experience, is sufficient to relieve them from the charge of negligence. It is urged that the predictions of the government officials of the weather bureau are not to be relied upon; that they are so frequently incorrect as to make them the laughing stock of the observant and the weather-wise. It may be that a predicted storm may be dissipated before reaching its apparent destination, or that one may unannounced come from a quarter where stations of information are few or absolutely wanting, but nevertheless we are of the opinion that these reports furnish the most trustworthy information attainable, and that those relying upon them should not be considered negligent or careless, as might be those who suffered injury despite these warnings.

The second charge of negligence is that the tugs should have "put back," and not proceeded upon the voyage, when at sunset the indications were that a storm was threatening. The evidence fails to substantiate the allegation that at that time there were any such indications. It is denied by all the witnesses whose duty it was to observe the signs of the weather and by all the others called in the case, except Mr. Griffin, who says merely that the sunset "was not a good one." All the others say that at sunset there were no signs of storm, and that it was clear, the wind light and from the westward, the sea smooth, and that there was no reason to believe that the favorable weather would not continue until they reached the Capes. It was not until about

3 o'clock in the morning of Saturday, when off Barnegat, that the wind shifted to the eastward, and the sea, in consequence, began to rise. It was then too late to turn back. They were 12 hours from Sandy Hook, and it would have required twice that time to have returned against the rising head wind. They were then obliged to keep on their course. The only time a return was practicable was at sunset, and it was not then apparently necessary or advisable.

The third charge is that the tugs were negligent in not furnishing a proper hawser for the towing. Various witnesses have been called to testify respecting its sufficiency. It seems to us, however, that the unanswerable reply to libelants' contention of unfitness is that they have not shown that the loss of the dock was in any way attributable to the weakness of the hawser. Long before the hawser parted it was apparent that the dock could not withstand the violence of the gale. Griffin, the libelants' employé, testified that at daylight he believed that the dock was doomed to destruction. He was on the dock, and in a position to know its condition. The sides were swaying to and fro, and the sea was sweeping through it from end to end. So dangerous did he regard the situation that he was unwilling to remain longer on the dock. He signaled the tugs to come to his assistance, and, when it was found that the tug could not approach the dock on account of the violence of the waves, Griffin seized a rope thrown to him from the tug, lashed it around his body, and cast himself into the sea, preferring to take that desperate risk rather than remain upon the sinking dock. The hawser held for some time after Griffin left the dock, and until about half past 8 in the morning, when, by a sudden strain caused by the surging of the vessel, it parted at the bitts of the tug. The same high seas which rendered it impossible for the tugs to approach the dock to effect Griffin's rescue prevented them from recovering the tow, and soon afterwards the dock was broken to pieces by the waves and sunk. A careful consideration of the evidence satisfies us that the fate of the dock would have been the same had the hawser held until it would have been necessary to cut it to prevent the tug from following the dock to the bottom of the sea.

Upon the whole case, we fail to find that any of the charges of negligence are sustained by the proofs, and we are of the opinion that the decree of the district court should be affirmed.

BUFORD v. KERR.

(Circuit Court of Appeals, Eighth Circuit. November 7, 1898.)

No. 1,063.

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—RULE OF PROPERTY.

Where, by a course of decision in the courts of a state, certain language, when used in a deed, will, or other muniment of title, is held to create a certain estate, or to confer certain rights, a rule of property is thereby established, and the federal courts will give to such language the effect to which it is entitled by the local law.

2. SAME—CONSTRUCTION AND EFFECT OF STATE STATUTE.

Where the courts of a state have by uniform decision fixed the meaning and effect of a state statute relating to estates created by deed or will, such decision will be followed by the federal courts in cases originating in that state.

In Error to the Circuit Court of the United States for the Western District of Missouri.

This was a suit in ejectment to recover the possession of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 33, and an undivided one-half interest in the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 34, township 50, range 32, situated in Jackson county, in the state of Missouri. The case was submitted to the lower court upon an agreed statement of facts, from which it appears: That both parties, John Buford, the plaintiff in error, and John A. Kerr, the defendant in error, derive title to the lands in controversy from Jacob Johnston, deceased, who died on July 25, 1851, seised of said land. That the deceased left, surviving him, six daughters, to wit, Mrs. Catherine Woodall, Mrs. Eliza Buford, the mother of the plaintiff in error, Mrs. Amanda Castleman, Mary Jane Johnston, Clarinda Johnston, and Julia Ann Johnston, and one son, Gordon P. Johnston. That all of said daughters are now dead, they having died in the following order, to wit: Clarinda Johnston, unmarried and childless, on July 25, 1851; Eliza Buford, November 11, 1860; Julia Ann Johnston, on February 14, 1864; Mrs. Amanda Castleman, on April 11, 1867; Mary Jane Johnston, on September 30, 1870; and Mrs. Catherine Woodall, on May 20, 1889. That, by his last will and testament, Jacob Johnston, deceased, devised separate tracts of land to his several daughters, the land in dispute in the present case being a part of that which was devised to his daughters Clarinda Johnston and Mary Jane Johnston, both of whom died leaving no issue. The language employed in making the devise to Mary Jane Johnston was as follows: "(7) I will and bequeath unto my dear daughter Mary Jane Johnston, and to the heirs of her body, the east $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, of section 33, township No. 50, and range No. 32, all the part of lot 37 in the town of Independence, by me purchased of Sam'l Weston's estate. * * * The same language was used in making each of the devises to his other daughters, including Clarinda, the only difference being in the tract of land therein described. In the concluding paragraphs of the will, after the aforesaid devises, was found the following clause: "Finally, it is my will and desire that should any of my heirs above named die without issue of their body, that the property bequeathed to such heir shall be equally divided between my then surviving heirs, the same to vest absolutely in them and the heirs of their body, except my son, Gordon P. Johnston, who, it is my will, shall take his share absolutely himself." John Buford, the plaintiff below, and the plaintiff in error here, is the son of Eliza Buford, and a grandson of Jacob Johnston, deceased. He has acquired all the interest of his brothers and sisters, the other children of Eliza Buford, in and to the tracts of land in controversy, and he claims title to the same, it being a part of the land devised to his aunts Clarinda and Mary Jane Johnston, who died childless, under and by virtue of the aforesaid will of his grandfather. John A. Kerr, the defendant, claims title to the same premises by virtue of adverse possession under color of certain partition proceedings among the heirs of Jacob Johnston, deceased, which took place prior to the year 1871. He has held open, notorious,

continuous, and exclusive possession of the property, adverse to all the world, since September 14, 1871. The question at issue in this case was before the supreme court of Missouri in the year 1894, and was decided by that court adversely to the claim preferred by the plaintiff. *Brown v. Rogers*, 125 Mo. 392, 28 S. W. 630. The circuit court followed the decision of the state supreme court, and the judgment below (86 Fed. 97) is before this court for review upon a writ of error sued out by the plaintiff.

O. A. Lucas (C. F. Moulton, on the brief), for plaintiff in error.

George W. Warner, Ed. E. Yates, M. A. Fyke, and C. V. Fyke, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The general question to be determined upon this record is whether this court is bound by the construction placed upon the will of Jacob Johnston, deceased, in *Brown v. Rogers*, 125 Mo. 392, 28 S. W. 630, or may express an independent judgment upon the merits of the controversy; and the decision of the latter question turns upon the further inquiry whether, in construing the language of the will, the supreme court of the state acted in accordance with a line of decisions in that state which are sufficient to establish a rule of property binding upon the federal courts. It is well settled that the federal courts will adopt the local law of real property, as ascertained by the decisions of the state courts, whether those decisions are grounded upon the construction of the statutes of the state, or form a part of its unwritten law. Therefore, when it appears that, by a course of decision in the courts of a state, certain language found in a deed, will, or other muniment of title is there held to create a certain estate, or to confer certain rights, the federal courts will give to such language the effect to which it is entitled by the local law. *Jackson v. Chew*, 12 Wheat. 153, 167, 168; *Suydam v. Williamson*, 24 How. 427; *Bucher v. Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. 974; *Burgess v. Seligman*, 107 U. S. 20, 33, 2 Sup. Ct. 10; *Swift v. Tyson*, 16 Pet. 1; *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945.

In the case of *Farrar v. Christy's Adm'rs*, 24 Mo. 453, decided in 1857, a deed was made by one Christy to his two sons, Edmund and Howard, whereby two lots were conveyed by metes and bounds to each son, to be held by them respectively and their heirs, forever, upon condition, however, that, should either son die without leaving legal heirs of his body, the survivor should inherit the whole of the four lots conveyed. It was held, in substance, that at common law each son would have taken an estate tail in the two lots conveyed to him, but that by virtue of the operation of a statute abolishing entails, which was enacted in Missouri in 1825 (now section 8836, Rev. St. Mo. 1889, quoted below),¹ each son

¹ Section 8836: "In cases where by the common or statute law of England any person might become seized in fee-tail of any lands by virtue of any devise, gift, grant, or other conveyance, or by any other means whatever, such person, instead of being seized thereof in fee-tail, shall be deemed and adjudged to be and shall become seized thereof for his natural life only; and the remainder shall pass in fee simple absolute to the person to whom the estate-tail would,

took merely an estate for life in the lots conveyed to him, and that each son had a remainder in fee in the lots conveyed to his brother, which vested immediately upon the execution of the deed, and was subject to be defeated only by the birth of issue to him who held the life estate.

In the case of *Harbison v. Swan*, 58 Mo. 147, decided in 1874, the instrument under consideration was a will, which contained provisions substantially like those found in the will of Jacob Johnston, deceased, now under consideration. The testator had devised one parcel of land to his daughter Harriet, and another parcel to his daughter Juliet, upon condition that, if either daughter died without issue, the parcel devised to her should vest in the survivor, and that, in the event of the death of both without issue, the said parcels of land should vest in the heirs of his daughters Mary and Clarissa, to be equally divided among them when they became of age. It was held, following the decision in *Farrar v. Christy's Adm'rs*, supra, that the effect of the devise was to give to each daughter an estate for life in the lands devised to her, and a remainder therein in fee simple to her sister, which remainder was subject to be defeated only by the birth of issue to her who held the life estate; and that inasmuch as Harriet, one of the devisees, died childless, the remainder which vested in her sister Juliet was never divested, but descended on the death of Juliet to her heirs, and not to the heirs of Harriet. In this latter case the rule which was applied in *Farrar v. Christy's Adm'rs*, supra, was severely criticised by counsel, and the court was asked to ignore it because it tended to defeat the manifest intention of the testator. The court adhered, however, to the construction of the statute abolishing entails, that had been adopted in *Farrar v. Christy's Adm'rs*, saying, in substance, that it was the duty of the court to give full effect to the purpose of the statute, even though the result would be to defeat the purpose of the testator.

In the case of *Thompson v. Craig*, 64 Mo. 312, decided in 1876, which involved the construction of a will like the one under consideration in *Harbison v. Swan*, supra, the same construction of the will was adopted that had been approved in the previous cases, and *Harbison v. Swan* and *Farrar v. Christy's Adm'rs* were cited as controlling authority.

In *Brown v. Rogers*, 125 Mo. 392, 399, 28 S. W. 630, the supreme court of the state decided, in substance, that the statute of Missouri barring entails operated upon the will of Jacob Johnston, deceased, and had the effect of vesting a life estate in Clarinda Johnston and Mary Jane Johnston to the land respectively devised to them, with remainder in fee simple to their respective heirs; that, as both of said devisees died without issue, the land devised to them vested absolutely in their collateral heirs as tenants in common, and, after the death of Clarinda and Mary Jane Johnston, was clearly subject to partition. It resulted from this view that the defendant had a good title by virtue of the statute of limitations. The decision was in accordance with the doctrine announced in the three previous cases heretofore cited. We think that these cases are sufficient to establish a rule of property which the federal courts are bound to follow in adjudicating upon the title to

on the death of the first grantee, devisee or donee in tail, first pass according to the course of the common law by virtue of such devise, gift, grant or conveyance."

land situated in that state. Moreover, the decisions contained an exposition of the meaning and effect of a local statute, from which the federal courts are not authorized to depart in cases originating in that state. *Travelers' Ins. Co. v. Oswego Tp.*, 19 U. S. App. 321, 7 C. C. A. 669, and 59 Fed. 58; *Railroad Co. v. Hogan*, 27 U. S. App. 184, 11 C. C. A. 51, and 63 Fed. 102; *McElvaine v. Brush*, 142 U. S. 155, 12 Sup. Ct. 156; *Brown v. Furniture Co.*, 16 U. S. App. 221, 7 C. C. A. 225, and 58 Fed. 286.

It results from these views that we are not at liberty to consider and determine upon independent investigation whether the will of Jacob Johnston, deceased, created an executory devise, and saved the title to land in controversy to the plaintiff in error, as his counsel very earnestly contends. We are precluded from entering upon that inquiry by a course of decision in the courts of the state, which we are constrained to hold is conclusive upon the point at issue. The judgment of the circuit court is therefore affirmed.

**SAN JOAQUIN & KING'S RIVER CANAL & IRRIGATION CO. v.
STANISLAUS COUNTY et al.**

(Circuit Court, N. D. California. May 25, 1898.)

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—NECESSITY OF DIVERSE CITIZENSHIP.

Where it affirmatively appears from the allegations of a bill that a federal question is directly involved, it is not essential to the jurisdiction of a federal court that diversity of citizenship between the parties should also appear.

2. SAME—DUE PROCESS OF LAW—STATE REGULATION OF CHARGES BY IRRIGATION COMPANY.

The action of a board of supervisors of a county of California, under the statute of the state, in fixing rates to be charged by an irrigation company for water furnished to consumers so low that they will not admit of the company earning such compensation as, under the circumstances, is just to it and to consumers, deprives the company of its property without due process of law, and of the equal protection of the laws, and a circuit court of the United States has jurisdiction of a suit to restrain the enforcement of such rates, where the allegations of the bill, if true, show that their enforcement will render it impossible for the complainant to earn a fair dividend upon the value of its property actually used in and useful to the appropriation and furnishing of such water.

Bill in equity to enjoin the defendants from enforcing, or attempting to enforce, a certain order of the board of supervisors of Stanislaus county fixing the rates which the complainant should charge for water distributed by it, and to declare said order null and void. Demurrer overruled.

Garret W. McEnerney, for complainant.

C. A. Stonesifer and L. W. Fulkerth, for respondents.

MORROW, Circuit Judge. This is a bill in equity to enjoin the defendants from enforcing, or attempting to enforce, a certain order of the board of supervisors of Stanislaus county fixing the rates which the

complainant should charge for water distributed by it, and to declare said order null and void. A demurrer is interposed on the grounds of want of jurisdiction and want of equity.

The bill charges, substantially, that the complainant, the San Joaquin & King's River Canal & Irrigation Company, is a corporation organized and existing under the laws of the state of California, and is a citizen and resident of said state; that it became an incorporation in the month of September, 1871, and was incorporated under the act of the legislature of the state of California entitled "An act to provide for the formation of corporations for certain purposes," approved April 14, 1853 (St. 1853, p. 87), as amended by an act of the legislature of the state of California entitled "An act to authorize the incorporation of canal companies and the construction of canals," approved May 14, 1862 (St. 1862, p. 540); that the defendant the county of Stanislaus is one of the political subdivisions of the state of California, and within the Northern district of California; that the board of supervisors of the said county of Stanislaus is the governing or legislative body of said county; that the defendants George W. Toombs, Charles H. Osler, James Alfred Davis, Thomas J. Carmichael, and Joseph P. Barnes were at all of the times stated and now are the duly-elected, qualified, and acting members of said board; that said defendants are citizens and residents of the state of California and of the Northern district of California; that the complainant, for more than 10 years last past, has been engaged, and is still engaged, in the business of appropriating water for irrigation, sale, rental, and distribution for hire, and does now and for more than 10 years last past has maintained a canal through the counties of Fresno, Merced, and Stanislaus, in the state of California, in which it carries its waters, so that the same may be sold and distributed to the takers or consumers thereof; that the complainant did, on the 1st day of January, 1896, ever since has, and does now, own and use, in the appropriation and furnishing of such water to its customers, and the consumers and users thereof, in the three counties aforesaid, canals, ditches, flumes, water chutes, and other property, which are actually used in and useful to the appropriation and furnishing of such water (excluding the right to appropriate the same), which property at all of said times was, and still is, of the reasonable worth and value of \$1,000,000; that the right of appropriation above alleged, of which the complainant is the owner, and which it acquired more than 20 years ago, and has ever since held and owned, is necessary to enable it to supply waters to its customers, and the consumers thereof, through the three counties aforesaid, and without said right of appropriation, and the waters obtained thereunder, the complainant would be unable to furnish said water to its customers, and the consumers thereof, and there is no other supply obtainable wherewith to supply such needs; that said right of appropriation was at all of the times herein mentioned, and now is, of the reasonable worth and of the fair value of \$500,000. Then follow averments of the rates charged by the complainant on the 1st day of January, 1896, and until the adoption of the order which it is sought to have enjoined; also of its total gross receipts for the period of nine years from 1887, to and including 1895, and of its expenses for the same period of time. In this connection, it is further alleged that

the average gross receipts of the complainant during said nine years were \$54,734.15 per annum, and the average cost of maintenance of the complainant during said period was \$22,045.16; that the net returns during said nine years upon the value of the property actually and necessarily used and useful to the appropriation and furnishing of such water by the complainants to its customers and the users thereof generally, together with the right to appropriate said water, amounted to a fraction over 2 per cent. per annum, and never reached $3\frac{1}{2}$ per cent. per annum, and never amounted to 5 per cent. per annum, upon the value of the canals, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation and furnishing of such water, exclusive of the value of the right of appropriation; that the operations of the complainant in the conduct and carrying on of its business have at all times been characterized by the strictest economy and prudence, and the expenses of the maintenance of its property and the cost of its operation have been the lowest figures at which such maintenance could be secured and such operation carried on; that the rates charged by the complainant, as alleged, as the prices required by it for the sale, rental, and distribution of its water to its customers, and to the users thereof, generally, were and are fair and reasonable; that in pursuance of a petition filed in the office of the board of supervisors of the county of Stanislaus, state of California, under an act of the legislature of the state of California approved March 12, 1885 (St. 1885, p. 95), entitled "An act to regulate and control the sale, rental and distribution of appropriated waters in this state, other than in any city, city and county or town therein, and to secure the rights of way for the conveyance of such water to the places of use," by which petition, signed by 25 persons claiming to be inhabitants and taxpayers of the said county of Stanislaus, said board of supervisors were petitioned to regulate and control the rates of compensation to be collected by the complainant for the sale, rental, and distribution of the waters of the complainant to the inhabitants of the said county of Stanislaus, said board of supervisors, on June 24, 1896, and the individual defendants as members of and composing said board, proceeded to and did, in pretended compliance with said act of the legislature aforesaid, fix certain rates to be thereafter charged by the complainant to the users of water in the county of Stanislaus. Then follow averments in which the rates charged are set forth, which, as appears from said bill, are lower than the rates charged by the complainant at the time said order was made. It is further alleged in the bill that, in and by its order fixing said rates, the said board of supervisors did estimate and fix, as the annual reasonable expenses, including the costs of repairs, management, and the operation of its works by the complainant, the sum of \$22,000 per annum, the annual and reasonable cost whereof was, is, and will for a long time hereafter continue to be, that sum or more; that the rates as fixed by the defendants are grossly unfair and unreasonable, and, if applied to its whole business, will not yield or net to the complainant more than \$40,000 gross per annum, or more than $1\frac{4}{5}$ per cent. upon the value of the canals, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation and furnishing of such water, exclusive of the value of the right to the appropriation

thereof, and will not yield or net to the complainant $1\frac{1}{8}$ per cent. per annum on the value of the canals, ditches, flumes, water chutes, and all other property actually used in and useful to the appropriation and furnishing of such water, together with the value of the right to appropriate such water; that, in fixing said rates as aforesaid, the defendants willfully, and in violation of the rights of the complainant, fixed and estimated the value of its ditches, flumes, water chutes, and other property actually used in and useful to the appropriation of the appropriated waters of the complainant, at the sum of \$337,000; that, in making said estimate, the defendants totally excluded and refused to consider, as one of the items of its property, its right of appropriation, without which it would be impossible to carry on its said business of selling, renting, and distributing such appropriated waters, and did make said estimate well knowing that the value of the property of the complainant, other than the value of its right to appropriate said waters, was far in excess of the sum of \$750,000, and did, without receiving any evidence of the value of said property, and without having any testimony as to what its value was, arbitrarily fix and declare it to be the sum of \$337,000, when in truth and in fact it was fully and reasonably worth three times that sum, as said individual defendants then and there well knew; that the defendants aver, and claim the fact to be, that, under the terms of the aforesaid act of the legislature referred to, they were not in duty bound, or bound at all, to consider, in fixing the rates to be charged by the complainant, the value of its right to appropriate the waters necessary and required by it to carry on its business of distributing water; that there is no reason to believe that the value of complainant's business will or can be increased by reason of the reduced rates fixed and established by the defendants, but complainant, upon information and belief, avers that if such threatened reduction should be made in its rates by the defendants, the same will necessarily result in a depreciation of its net receipts, so that the same will not ever amount to or exceed 3 per cent. per annum upon the value of its property used and necessarily employed in the appropriation, sale, rental, and distribution of its waters in the manner hereinbefore alleged; that the act of the legislature, under which it is claimed and pretended that said rates have been fixed and established, is in violation of, and repugnant to, the provisions of section 1 of the fourteenth amendment to the constitution of the United States, in this: that, by the provisions of said act, it is declared that the rates authorized to be fixed and established thereunder shall be fixed and established without reference to the value of the right of any person, corporation, or association to receive compensation for, or a return upon, the value of any right by it held or owned to appropriate any waters of this state for sale, rental, and distribution to the inhabitants thereof; that, under the rates as fixed by the defendants, the complainant will not receive a return greater than 2 per cent. per annum upon the value of its property, which is grossly unfair and unreasonable; that, in fixing said rates so that the same do not afford nor secure to the complainant a fair, just, reasonable, or equitable return upon the value of its property devoted to the said public use, the defendants have sought to and will effect a deprivation of the property of the complainant without due process of law, and will be a denial to it of the equal

protection of the law, under section 1 of article 14 of the amendments to the constitution of the United States. The bill then prays for an injunction; that the said order be declared null and void; and that it be adjudged and decreed that the complainant is entitled to have the rates for supplying its waters to its customers, and to the users thereof generally, so fixed that they will, in the aggregate, afford a reasonable and just compensation for the services rendered, and a fair, just, and equitable return therefor.

In support of the objection raised by the demurrer to the jurisdiction of this court, it is urged that it appears, from the allegations of the bill, that the complainant and the defendants are citizens of this state, and that this is fatal to the jurisdiction of the circuit court. But this fact does not deprive the circuit court of jurisdiction, if it appear, from the allegations of the bill, that a federal question is involved. The same objection was made in the case of *City Ry. Co. v. Citizens' St. Ry. Co.*, 166 U. S. 557, 17 Sup. Ct. 653. Mr. Justice Brown, delivering the opinion of the court in that case, said, in overruling this objection to the jurisdiction of the circuit court:

"There can be no doubt that the circuit court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the state of Indiana. It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill, and not upon the facts as they subsequently turned out to be. * * * All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair."

It is immaterial, therefore, that there is an absence of diversity of citizenship, so long as the alleged cause of action arises under the constitution, laws, or treaties of the United States, and a federal question or controversy is presented. Diversity of citizenship and a federal question are two separate and distinct sources of federal jurisdiction, and, while it happens that both may exist in the same case, still it is not necessary that both should concur to give the circuit court jurisdiction. If either exist, and the necessary jurisdictional amount is involved, jurisdiction attaches. *Act Aug. 13, 1888 (25 Stat. 433)*. In *Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, both grounds of jurisdiction, viz. diversity of citizenship and a federal question, existed. In *City Ry. Co. v. Citizens' St. Ry. Co.*, supra, there was not any diversity of citizenship, but a federal question was presented. It is therefore clear that the jurisdiction of this court must be determined by the existence or nonexistence of a federal question in the case as made by the bill. In other words, as the jurisdiction of the circuit court of the United States is limited, in the sense that it has no other jurisdiction than that conferred by the constitution and laws of the United States, it must affirmatively appear, from the allegations of the bill itself, that a federal question is directly involved. *Metcalf v. Wauertown*, 128 U. S. 586, 9 Sup. Ct. 173; *Mining Co. v. Turck*, 150 U. S. 138, 14 Sup. Ct. 35; *Hanford v. Davies*, 163 U. S. 273, 279, 16 Sup. Ct. 1051; *Publishing Co. v. Monroe*, 164 U. S. 105, 110, 17 Sup. Ct. 40; *Railroad Co. v. Steele*, 167 U. S. 659, 662, 17 Sup. Ct. 925; *Montana Ore-Purchasing Co. v. Boston & M. C. C. & S. Min. Co.*, 29 C. C. A. 462, 85 Fed. 867.

What, then, is this federal question, as presented by the averments of the bill in this suit? It is alleged, in substance, that if the order fixing the rates for the distribution of water adopted by the board of supervisors of Stanislaus county be not enjoined, and declared null and void, the complainant will, by reason of the alleged low rates prescribed and fixed in the said order, be practically deprived of its property without due process of law, and that it will be denied the equal protection of the laws vouchsafed by the fourteenth amendment to the constitution of the United States. That the complainant is a quasi public corporation is well settled. *Irrigation Dist. v. Bradley*, supra; *San Diego Land & Town Co. v. City of National City*, 74 Fed. 79; *Fudickar v. Irrigation Dist.*, 109 Cal. 29, 41 Pac. 1024; *Spring Val. Waterworks v. Board of Sup'rs of San Francisco*, 61 Cal. 3; *Price v. Irrigating Co.*, 56 Cal. 431; *Ditch Co. v. Zellerbach*, 37 Cal. 577; *Civ. Code Cal. § 1410 et seq.*; *Act March 12, 1885 (St. Cal. 1885, p. 95)*. As a quasi public corporation, the complainant is undoubtedly subject to reasonable regulations as to the rates it should charge for the distribution of water. It must be held to have accepted its franchise, rights, and privileges subject to the condition that the government creating it, or the government within whose limits it conducts its business, may, by legislation, protect the people against unreasonable charges for the services rendered by it. But, on the other hand, it is not subject to such unreasonable regulations as would deprive it from earning a reasonable profit on its investment; thereby amounting, substantially, to a taking of property without due process of law, and denying to it the equal protection of the laws. *Smyth v. Ames*, 18 Sup. Ct. 418, and cases there cited.

In *Railway Co. v. Gill*, 156 U. S. 649, 657, 15 Sup. Ct. 487, it was said that "there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws,"—citing *Railroad Commission Cases*, 116 U. S. 307, 331, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191; *Dow v. Beidelman*, 125 U. S. 681, 8 Sup. Ct. 1028; *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702; *Railway Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400; *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047.

In *Turnpike Road Co. v. Sandford*, 164 U. S. 578, 594, 17 Sup. Ct. 204, Mr. Justice Harlan, delivering the opinion of the court, said:

"A statute which, by its necessary operation, compels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair and from earning any dividends whatever for stockholders, is as obnoxious to the constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight."

In *Smyth v. Ames*, supra, the same learned justice, after making an extensive review of the cases on the subject, thus summarized the law:

"A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would, therefore, be repugnant to the fourteenth amendment of the constitution of the United States. While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the constitution secures, and therefore without due process of law, cannot be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

With respect to the merits of the question presented by the bill, it is obvious that the court cannot, at this stage of the proceedings, determine that controversy. Whether or not the complainant can justly complain of the rates fixed by the order of the board of supervisors of Stanislaus county, and whether or not the same are unreasonably low, must depend upon the evidence to be adduced upon the hearing. The court cannot now say to what extent they are unreasonable, if, indeed, they be determined to be unreasonable at all. It is sufficient, for the purposes of the demurrer, that the bill presents a federal question. It therefore follows, from the views stated, that the demurrer should be overruled; and it is so ordered.

UNITED STATES v. REID et al.

(Circuit Court, D. Nevada. November 14, 1898.)

No. 659.

JURISDICTION OF FEDERAL COURTS—SUITS BY UNITED STATES.

Under the judiciary acts of 1887-88, the federal courts have jurisdiction of a civil action at law in which the United States is plaintiff, without regard to the amount in dispute.

This is an action by the United States against John T. Reid and others on a postmaster's bond. Heard on demurrer to complaint.

Sardis Summerfield, U. S. Atty.

Robert M. Clarke, for defendants.

HAWLEY, District Judge (orally). This is an action upon a postmaster's bond to recover the sum of \$667.38. Defendants demur to the complaint upon the ground that this court has no jurisdiction; the action being one of a civil nature at common law, and the matter in dispute being less than \$2,000. If the question of jurisdiction rested solely on the provisions of the act of March 3, 1887 (24 Stat. 552), and of August 13, 1888 (25 Stat. 433), it might be said that it was not entirely free from doubt. But it has been ably discussed and reviewed at length by Speer, J., in *U. S. v. Shaw*, 39 Fed. 433, and by Barr, J., in *U. S. v. Kentucky River Mills*, 45 Fed. 273, and by the supreme court in *U. S. v. Sayward*, 160 U. S. 493, 16 Sup. Ct. 371. In each of these cases the judiciary act of 1789, the act of March 3, 1875, and sections 563 and 629 of the Revised Statutes, are referred to, and

numerous authorities bearing more or less upon the question are cited; and particular attention is called to the act of March 3, 1875, of which the act of March 3, 1887, is an amendment, and to the fact that in the act of 1875 the limitation as to amount precedes the clauses conferring jurisdiction over the special subjects therein enumerated, and that in the act as amended in 1887-88 the limitation as to amount follows after the enumeration of the subjects wherever mentioned, but does not repeat the limitation after the clause, "or in which the United States are plaintiffs or petitioners"; and they came to the conclusion that by repeating the limitation clause as to the amount necessary to confer jurisdiction in several classes, and omitting it after the clause conferring jurisdiction over government suits, like the present one, it must have been the intention of congress that the United States should be allowed to bring suits of this character in the circuit court, without regard to the amount in controversy. See, also, *Fales v. Railway Co.*, 32 Fed. 673; *U. S. v. Belknap*, 73 Fed. 19, 21. My attention has not been called to any case holding the contrary view. Demurrer overruled.

KEENE FIVE-CENT SAV. BANK V. LYON COUNTY OF STATE OF IOWA.

FAULKNER v. SAME.

(Circuit Court, N. D. Iowa, W. D. November 26, 1898.)

1. JURISDICTION OF FEDERAL COURTS—ASSIGNEE OF MUNICIPAL BONDS—INSTRUMENTS PAYABLE TO BEARER.

County bonds issued with the space for the name of the payee left blank are, in legal effect, instruments payable to bearer, within the meaning of the act of August 13, 1888 (25 Stat. 434); and a transferee having the requisite citizenship, to whom they were transferred in the same condition by delivery, may sue thereon in the federal court, though the original holder could not.

2. MUNICIPAL CORPORATIONS—FIXING LIMIT OF INDEBTEDNESS—STATUTE GRANTING EXEMPTION FROM TAXATION.

The constitution of Iowa limits the aggregate legal indebtedness of any county or other political or municipal corporation to 5 per cent. on the value of the taxable property therein, to be ascertained by the last preceding state and county tax lists. McClain's Code 1888, § 1272, provides that for each acre of forest or fruit trees planted a fixed sum shall be exempted from taxation upon the owner's assessment for a certain number of years,—the amount to be deducted by the assessor from the valuation of his property,—provided such amount shall not exceed one-half the valuation of the realty on which the exemption is claimed. Section 1271 declares that certain classes of property shall not be taxed, and authorizes their omission from assessments. In practice, all the land of an owner is listed and assessed, without regard to a claim for exemption on account of tree planting, the number of acres of trees planted is entered upon the assessment book, and the statutory exemption thereon is deducted from the total assessment. *Held*, that such exemption is in the nature of a bounty, and does not affect the "value of the taxable property" in a county, within the constitutional provision, which, for the purpose of fixing the limit of the county's indebtedness, is the total valuation placed upon such property, without deducting the amount of the exemption.

3. SAME—COMPUTING OUTSTANDING INDEBTEDNESS—EXCESSIVE ISSUE OF BONDS.

Where an issue of bonds by a county was in excess of the constitutional limit of its indebtedness, such bonds did not constitute a valid and en-

forceable debt which is to be considered in computing the county's indebtedness at the time of a subsequent issue, made while they were outstanding, though they were afterwards redeemed, as such fact did not validate them as of any date prior to that of their payment.

4. SAME—UNLIQUIDATED CLAIMS.

In computing the existing indebtedness of a county on the date of the issue of bonds, unliquidated claims, which had not been filed or presented to the county board for allowance, without which, under the statute, they would not constitute legal demands which would support an action against the county, are not to be considered.

5. MUNICIPAL BONDS—FUNDING BONDS OF COUNTY—PRESUMPTION OF VALIDITY.

Every presumption is in favor of the validity of negotiable bonds issued by a county for the purpose of funding its existing warrant indebtedness as authorized by statute; and to defeat such bonds, in the hands of innocent purchasers for value, on the ground that their issuance caused the indebtedness of the county to exceed the constitutional limit, the necessary facts must be clearly proven.

The parties plaintiff and defendant in the above-entitled cases, by written stipulations duly filed, waived a jury trial, and submitted the evidence to the court, from which the court finds the facts to be as follows (it being agreed that the cases should be consolidated for trial purposes):

(1) The plaintiff the Keene Five-Cent Savings Bank was when this action was brought, and is now, a corporation created under the laws of the state of New Hampshire; and the defendant county was when the suit was brought, and is now, a corporation created under the laws of the state of Iowa, the county being organized in January, 1872; and the amount involved in the controversy exceeds the sum of \$2,000, exclusive of interest and costs; and the plaintiff Eliza J. Faulkner was when this suit was brought, and is now, a citizen of the state of New Hampshire.

(2) The action of the Keene Five-Cent Savings Bank is based upon certain bonds, with interest coupons, issued by the defendant, Lyon county, negotiable in form; the dates, numbers, and amounts of the bonds being as follows:

Date.	Number.	Amount.	Date.	Number.	Amount.
June 1, 1880.....	32	\$ 500	June 13, 1882.....	10	\$ 100
" " "	34	500	" " "	11	1,000
" " "	35	500	" " "	12	1,000
" " "	36	100	" " "	13	1,000
" " "	37	100	" " "	14	1,000
" " "	38	100	" " "	15	500
Sept. 6, 1881.....	47	1,000	" " "	16	500
" " "	48	1,000	" " "	17	500
" " "	49	1,000	" " "	18	500
" " "	50	1,000	" " "	19	1,000
June 13, 1882.....	1	100	" " "	20	1,000
" " "	2	100	Sept. 1, 1884.....	21	500
" " "	7	100	" " "	22	500
" " "	8	100	" " "	24	500
" " "	9	100	" " "	26	500

The action of the plaintiff Eliza J. Faulkner is based upon certain bonds, with interest coupons, issued by the defendant, Lyon county, negotiable in form; the dates, numbers, and amounts of the bonds being as follows:

Date.	Number.	Amount.	Date.	Number.	Amount.
June 13, 1882.....	3	\$100	Sept. 1, 1884.....	25	\$500
" " "	4	100	March 1, 1885.....	29	500
" " "	5	100	" " "	30	500
" " "	6	100	" " "	31	500
Sept. 1, 1884.....	24	500			

(3) The bonds in question, with the coupons thereto belonging, were duly signed by the proper officers of Lyon county, and in form are the negotiable bonds and coupons of the county, and are the property of the plaintiffs; having been purchased by them before maturity, and for value. When issued, the blank spaces in the printed form of the bonds left for the name of the payee were not filled up, so that when the bonds were sold and delivered they were payable to — or order. The bonds were originally sold in this form to citizens of the state of Iowa,—those dated September 1, 1884, being sold to the First National Bank of Rock Rapids, Iowa, from which bank the plaintiffs purchased the same for value before maturity; and when delivered to the plaintiffs the blank space for the name of the payee had not been filled up. The bonds issued under date of March 1, 1885, were issued to Miller & Thompson, citizens of Iowa, for warrants held by them, and were subsequently, before maturity, sold by Miller & Thompson to E. F. Drake, a citizen of Minnesota, whose name was then written in as payee, and from whom the plaintiff Faulkner purchased these bonds for value before maturity. The bonds and coupons sued on in the two cases are past due and unpaid. Upon the bonds of June 1, 1880, there are 7 coupons unpaid; beginning with coupon No. 14, due June 1, 1887. Upon the bonds of September 6, 1881, there are 9 coupons unpaid; beginning with No. 12, coming due September 6, 1887. Upon the bonds of June 13, 1882, there are 11 coupons unpaid; beginning with No. 10, coming due June 13, 1887. Upon the bonds of September 1, 1884, there are 16 coupons unpaid, beginning with No. 5, coming due March 1, 1887. Upon the bonds of March 1, 1885, there are 16 coupons unpaid; beginning with No. 5, coming due September 1, 1887. The several issues of bonds sued one in the two cases were 10-year bonds, becoming due in 10 years from their respective dates.

(4) The first state and county tax lists for the county were those for the year 1872, and the amounts of the taxable property within the defendant county, as shown by the state and county tax lists for the various years since the organization of the county, not taking into account the property exempted from taxation by reason of the timber culture acts of the state of Iowa, are as follows, to wit:

For the year	1872.....	\$ 499,099 96
" " "	1873.....	1,009,444 56
" " "	1874.....	997,822 62
" " "	1875.....	1,061,806 63
" " "	1876.....	1,081,356 09
" " "	1877.....	885,262 80
" " "	1878.....	889,757 85
" " "	1879.....	915,133 28
" " "	1880.....	1,066,707 00
" " "	1881.....	978,259 00
" " "	1882.....	989,550 00
" " "	1883.....	1,384,289 00
" " "	1884.....	1,437,527 00
" " "	1885.....	1,558,043 00

(5) It is further found that the exemptions under the timber culture acts of the state of Iowa on assessments against property owners in Lyon county, as shown by the state and county tax lists of Lyon county, Iowa, were for the year 1879, and for the various years since, as follows:

For the year	1879.....	\$ 75,218 80
" " "	1880.....	171,551 00
" " "	1881.....	171,514 00
" " "	1882.....	175,547 00
" " "	1883.....	177,182 00
" " "	1884.....	143,208 00
" " "	1885.....	160,135 00

The tax lists of said Lyon county, Iowa, for the years 1879 to 1885, inclusive, were made up as follows: First column, name of owner; second column, part of section, name of town; third column, section or lot; fourth column, township or block; fifth column, number of acres; sixth column, value of

land or town lot; seventh column, value of personalty; eighth column, exemptions for trees under state laws; ninth column, total value for taxation. And the property assessed for taxation was entered upon the books by entering under the proper columns the name of the owner, the description of the land or lot, the number of acres, the value of the land or lot, the value of the personalty, and under column 8 the amount of exemptions for trees under the state laws, and under the ninth column the total value for taxation, as shown by columns 6 and 7, after deducting the amount entered under column 8.

(6) From the 18th day of July, 1872, to the 28th day of July, 1873, there were issued by the defendant county \$55,000 of judgment bonds for the purpose of paying judgments aggregating \$55,000 which had been rendered against said county, which said judgments are set out in paragraph 4 of the findings of the court in the case of *Ætna Life Ins. Co. v. Lyon Co.*, reported in 44 Fed. 329.

(7) That from July 28, 1873, up to July 1, 1879, funding bonds were issued by the defendant county under the provisions of chapter 1, tit. 4, of the Code of Iowa for 1873, as amended by chapter 9 of the Acts of the Fifteenth General Assembly, and chapter 154 of the Acts of the Seventeenth General Assembly, at various dates, and in amounts as follows:

October 19, 1874.....	\$10,000
December 1, 1874.....	6,000
February 16, 1875.....	1,000
September 18, 1875.....	5,100
October 18, 1875.....	200
November 9, 1875.....	400
September 6, 1876.....	20,000
July 7, 1877.....	3,600
February 7, 1878.....	1,000
June 4, 1878.....	5,200
February 19, 1879.....	1,400
June 4, 1879.....	1,400
Total	\$55,300

(8) July 1, 1879, the defendant county issued \$100,000 of 8 per cent. refunding bonds, under the provisions of chapter 58 of the Acts of the Seventeenth General Assembly of the State of Iowa, and upon the following resolution of the board of supervisors of said county, of date April 3, 1878:

"Whereas, in accordance with an act of the Seventeenth general assembly of the state of Iowa authorizing counties, citizens, and towns to refund outstanding bonded indebtedness at a lower rate of interest, and to provide for the payment thereof, the board of supervisors of Lyon county, Iowa, in regular session assembled, deem it for the public interest to refund all indebtedness of said county evidenced by the bonds thereof heretofore issued, and outstanding at the time of the passage of this act: Therefore, be it resolved by said board of supervisors, that the chairman of said board and the auditor of said county are hereby authorized and empowered to issue the coupon bonds of said county, in sums not less than one hundred dollars (\$100.00), nor more than one thousand dollars (\$1,000.00), having not more than fifteen years to run, redeemable in lawful money of the United States of America, at the pleasure of said county of Lyon, after five years from date of issue, and bearing interest, payable semiannually, at the rate of eight per centum (8%) per annum, which bonds shall be substantially in the form set forth in said bill, to wit, from lines eleven (11) to twenty-nine (29), inclusive, and deliver the same to J. Shade, the treasurer of said Lyon county, Iowa, who is hereby authorized to sell and dispose of said bonds so issued in accordance with said act of the Seventeenth general assembly of the state of Iowa, and for no other purpose whatever. It is further resolved by the board of supervisors of said Lyon county, Iowa, that two per centum (2%) be, and the same is hereby, appropriated of the bonds herein authorized to be issued, to pay the cost or expenses of preparing, issuing, advertising, and disposing of the same, and that J. Shade is hereby employed as financial agent therefor, with power to employ an assistant, if he so desire, and that all matters herein set forth shall

be done in strict conformity with this resolution and the provisions of said act. The foregoing was approved by all the members of the board of supervisors of Lyon county."

(9) The foregoing resolution was spread upon the records, and is upon page 337 of Book A of the records of the proceedings of the board of supervisors of said county; and the proceeds of this issue of Shade refunding bonds, amounting to \$100,000, were used to pay the principal and interest of bonds issued prior thereto, as follows: The amount of \$53,500 thereof was used to pay in full all of the \$53,000 of judgment bonds heretofore referred to, and which were issued in 1872 and 1873, and which were outstanding and unpaid, being in amount \$53,000 of principal and \$500 of interest, including the whole of the \$6,800 issued upon the judgment in favor of C. A. Greely, and which was reversed in the supreme court of Iowa. The remainder of the proceeds arising from the sale of the issue of Shade refunding bonds of \$100,000 issued July 1, 1879, was used to pay said above-mentioned \$47,300 of funding bonds, not issued upon, or to pay judgments, with accrued interest thereon, amounting to \$1,085, hereinbefore referred to as being issued between October 19, 1874, and February 7, 1878, both dates inclusive, as set forth in finding No. 7.

(10) The following additional judgments were entered against the defendant, Lyon county, at the dates and in the amounts named, to wit:

E. T. Kirk, July 24, 1873.....	\$2,204 23
James H. Wagner, April 21, 1874.....	672 06
A. J. Harmon, April 21, 1874.....	381 42
Perkins Bros., August 22, 1874.....	815 05
Wilson & Van Saun & Co., May 5, 1875.....	3,850 34
Lyman J. Gage, October 16, 1875.....	4,460 56
C. H. Smith, November 15, 1876.....	233 00
E. T. Drake, May 14, 1878.....	462 67
Swan & Fawcett, May 14, 1878.....	603 00
A. H. Andrews & Co., May 14, 1878.....	107 45
T. C. Thompson, May 14, 1878.....	304 00
Chase & Taylor, May 14, 1878.....	479 10

—Which said judgments were satisfied prior to the 1st day of July, 1879, either by the issuance of the bonds set out in paragraph 7, or the proceeds of their sale, or warrants or cash derived from other sources, and that no judgments were rendered against said county after May 14, 1878.

(11) The next bonds issued by the defendant county were issued on January 8, 1880, and that on said date, and at various dates subsequent thereto, up to and including July 1, 1885, there were issued \$60,600 of funding bonds, under the provisions of chapter 1, tit. 4, Code 1873; chapter 9, Acts 15th Gen. Assem.; chapter 125, Acts 16th Gen. Assem.; chapter 154, Acts 17th Gen. Assem.; chapter 183, Acts 18th Gen. Assem.; chapter 147, Acts 19th Gen. Assem.; chapter 80, Acts 20th Gen. Assem.,—at dates and in amounts as follows:

January 8, 1880.....	\$ 600
May 12, 1880.....	11,600
June 1, 1880.....	6,800
November 12, 1880.....	2,400
September 6, 1881.....	4,000
June 13, 1882.....	9,000
September 1, 1884.....	3,100
March 1, 1885.....	3,100
July 1, 1885.....	20,000
Total	\$60,600

(12) That the whole amount of said bonds was issued for the purpose of taking up outstanding floating warrants against said county, and on the date of the issuance of the last \$20,000 thereof, to wit, July 1, 1885, there was over \$20,000 of warrants outstanding against said county, which had been outstanding and unpaid more than six months prior to July 1, 1885; said bonds being issued to take up said warrants under a resolution of the board of supervisors of said county of date April 10, 1884, as follows:

"Whereas, the county of Lyon, state of Iowa, has a floating indebtedness in warrants of the different funds of said county; and whereas, the board of supervisors of said county deem it for the best interest of the county to bond the same: Be it therefore resolved by the board of supervisors of Lyon county, Iowa, that the chairman, with the auditor, be authorized to issue bonds in amounts sufficient to cover said indebtedness, and deliver the same to the county treasurer, and take his receipt therefor. Adopted by a full vote of the board."

(13) On May 1, 1885, an issue of \$120,000 of refunding bonds was made by the defendant county under the provisions of chapter 58 of the Acts of the Seventeenth General Assembly, and chapter 175 of the Acts of the Twentieth General Assembly, of the state of Iowa, and under a resolution of the board of supervisors of said county of date April 11, 1884, as follows:

"Whereas, it is deemed to be for the public interest to refund the indebtedness of the county of Lyon, state of Iowa, evidenced by the bonds thereof heretofore issued, and outstanding on the 1st day of January, 1884, and to issue the coupon bonds of county: It is therefore resolved by the board of supervisors of said county, in session assembled, to issue coupon bonds of this county in sums not less than one hundred nor more than one thousand dollars, having not more than twenty years to run, redeemable in lawful money of the United States of America, at the pleasure of the county, after five years from the date thereof, and bearing interest, payable semiannually, at 6 per cent. per annum, which bonds shall be substantially in the form given in section 1, ch. 58, 17th General Assembly, and shall bear the date of July 1, 1885, or on the 1st day of any month called for by Miller & Thompson; and the chairman of the board, and the auditor of this board, and auditor of the county are hereby directed to issue same in accordance with said statute and this resolution. In testimony whereof, the said county, by its board of supervisors, has caused this bond to be signed by the chairman of the board, and attested by the auditor, with the county seal attached, this 1st day of May, 1885.

"[Seal.]

J. G. Anderson,

"Chairman of the Board of Supervisors.

"L. C. Thompson,

"County Auditor."

(14) The issue of \$120,000 of bonds of defendant county bearing date May 1, 1885, were sold at the dates, in the amounts, and of the numbers, and to the persons or corporations, as follows, to wit: June 1, 1885, Nos. 01 to 027, to G. B. Provost; June 4, 1885, Nos. 048 to 052, to C. H. Elghmey; June 6, 1885, Nos. 053 to 055, to Dubuque National Bank; August 28, 1885, Nos. 056 to 090, to Aetna Life Insurance Company; September 1, 1885, Nos. 091 to 095, to United States National Bank; September 1, 1885, Nos. 096 to 0105, to Orient Fire Insurance Company; September 2, 1885, Nos. 0106 to 0110, to Connecticut General Life Insurance Company; September 8, 1885, Nos. 028 to 047, to Saving & Trust Company of Cleveland, Ohio; September 20, 1885, Nos. 0111 to 0120, to Hartford Steam-Boiler Inspection & Insurance Company.

(15) The proceeds of the \$120,000 issue of bonds of said county dated May 1, 1885, were used to take up and pay off the \$100,000 issue of bonds of July 1, 1879, and unpaid interest thereon, and the balance to take up funding bonds of said county outstanding at the date of the issue of said \$120,000 of bonds, and the commission for placing of said \$120,000 for sale, amounting to \$2,438.59.

(16) The bonds in suit in the case of Aetna Life Ins. Co. v. Lyon Co., reported in 44 Fed. 329, being 410 interest coupons for \$30 each, were from the said \$120,000 of bonds of May 1, 1885, which said bonds were in denominations of \$1,000 each.

(17) No other bonds were issued by the defendant county than as set out in this finding of facts. All of the bonds issued by said county prior to the date of the issuance of the bonds in suit were outstanding and unpaid at the time of the issuance of the bonds, except as shown by the facts hereinbefore set forth.

(18) The \$100,000 of bonds issued July 1, 1879, were in denominations of \$1,000 each, and bore interest at the rate of 8 per cent. per annum, payable semiannually, evidenced by coupons attached to said bonds; and said interest was regularly paid by the defendant county at its maturity, from the issuance of said bonds, up to the date said bonds were taken up and paid off.

(19) The defendant county for each year from the time of its organization, up to and including the year 1886, levied a tax, under the name of the "Bond and Interest Fund," upon the taxable property of the said county; and from the fund derived from said taxation the said county regularly paid the interest upon all of the bonds issued by it up to the 11th day of May, 1887, except that part of the interest on bonds which was paid from the money derived from the sale of bonds, amounting to \$661.41 of the \$100,000 issue, and \$1,585 of the bonds of said county issued prior to the \$100,000 issue.

(20) From the treasurer's warrant record (a record kept in due course of business by the defendant county), it appears that on June 1, 1880, there were outstanding against the defendant county warrants in the sum total of \$4,259, which were subsequently taken up.

(21) On September 6, 1881, there was outstanding warrant to the amount of \$370, which was subsequently paid.

(22) On June 13, 1882, there were outstanding warrants to the amount of \$15,225, which were subsequently paid.

(23) On September 1, 1884, there were outstanding warrants to the amount of \$25,343, of which \$2,663.14 were funded in (that is, exchanged for) bonds on that day issued, and the remainder of the warrants were subsequently paid.

(24) On March 1, 1885, there were outstanding warrants to the amount of \$29,466, of which \$2,820.09 were funded in (that is, exchanged for) bonds on that day issued, and the remainder of the warrants were subsequently paid.

(25) Portions of the several amounts of warrants shown to be outstanding in the years 1880 to 1885, both inclusive, were drawn against and paid from funds in the county treasury, derived from the taxes of these years; but, from the evidence submitted, the court is not able to state the amounts of the warrants thus paid.

(26) Of the bonds issued in 1878 and 1879, there were paid and canceled prior to June 13, 1882, the amount of \$2,400; and prior to September 1, 1884, there were paid and canceled bonds to the amount of \$4,300.

(27) On the bonds and coupons owned by the Keene Five-Cent Savings Bank there is due, interest being calculated to December 1, 1898, the sum of \$33,275.20; and on the bonds and coupons owned by Eliza J. Faulkner, the sum of \$5,504.92, interest being calculated to December 1, 1898; and excluding in both cases coupons No. 14 of the issue of June 1, 1880, No. 10 of the issue of June 13, 1882, and No. 5 of the issue of September 1, 1884, these coupons being barred by the statute of limitations.

J. M. Parsons, for plaintiffs.

E. C. Roach, E. G. Greenleaf, and Simeon Fisher, for defendant.

SHIRAS, District Judge (after stating the facts as above). The first question presented for consideration in the briefs of counsel is that of the jurisdiction of the court, it being claimed on behalf of the defendant that the plaintiff bank was not the original holder of the bonds sued on; that the action is therefore in the name of an assignee, and that the court cannot take jurisdiction, unless that right would exist if the action was in the name of the assignors, from whom the plaintiffs derived title to the bonds sued on; and that, as the evidence shows that the bonds were originally issued to citizens of Iowa, it follows that this court is without jurisdiction. The bonds are made by a corporation, and if they were, in legal effect, payable to bearer when they became the property of the plaintiff, then they come within

the exception contained in the first section of the act of congress approved August 13, 1888 (25 Stat. 434), which excepts, out of the clause preventing jurisdiction from attaching in favor of an assignee when it would not exist in favor of the assignor, cases based upon foreign bills of exchange, or upon corporate obligations payable to bearer. Counsel for the defendant county place some stress upon the use of the words "made payable to bearer," which are found in some of the cases cited by them, and found thereon the argument that, to come within the exception of the statute, the bond or other corporate obligation must, in terms, or on its face, be made payable to bearer; but the statute does not use the word "made," upon which reliance is placed in the argument of counsel. The language of the statute is, "if such instrument be payable to bearer"; and therefore the question is whether a bond issued in blank (that is, without the name of a payee being inserted), and which in that form is sold, and passes from hand to hand, is or is not, in legal effect, an instrument payable to bearer. If it is, then it comes within the exception, and the question of jurisdiction is not affected by the citizenship of the parties by whom it may have been owned before becoming the property of the person in whose name the action is brought. It is well settled that if a note or bond is made payable to a named person or order, and is by him indorsed in blank, it becomes transferable by delivery, or is, in effect, an instrument payable to bearer. *School Dist. v. Hall*, 113 U. S. 135, 5 Sup. Ct. 371. The test is whether the plaintiff in the given case, in order to maintain the action, is compelled to rely upon an assignment or indorsement from another as proof of title to the chose in action, or whether such title and consequent right of action will be inferred from possession of the instrument, as the holder or bearer thereof. In *White v. Railroad Co.*, 21 How. 575, it appeared that the railroad company, a Massachusetts corporation, had issued a number of bonds payable in blank, which were sold in the market, and passed from hand to hand, the original purchaser being a citizen of Massachusetts; but the same were finally bought by the plaintiff, White, who was a citizen of the state of New Hampshire, and who inserted his own name as payee, and then brought suit thereon in the United States circuit court in Massachusetts. That court held that, under the facts of the case, it did not have jurisdiction, but the supreme court reversed this ruling, stating in the opinion that:

"The ground upon which this ruling below is sought to be maintained is that these bonds were issued to citizens of Massachusetts, and as they could not be regarded as negotiable instruments, or, if negotiable, not payable to bearer, the plaintiff was disabled from suing in the federal court, within the prohibition of the eleventh section of the judiciary act. *Smith v. Clapp*, 15 Pet. 125; *Bank v. Wister*, 2 Pet. 318; *Bonafée v. Williams*, 3 How. 574; *Sheldon v. Sill*, 8 How. 441. In answer to this ground, we think it is quite clear, on looking into the agreed state of facts, in connection with the bonds and the mortgage given to secure their payment, that it was the intention of the company, by issuing the bonds in blank, to make them negotiable and payable to the holder, as bearer, and that the holder might fill up the blank with his own name, or make them payable to himself or bearer, or to order. * * * Assuming, then, that these bonds were intended to be made negotiable, we do not see the difficulty suggested in maintaining the suit in the federal court; for, until the plaintiff chose to fill up the blank, he is to be regarded as holding the bonds as bearer, and held them in this character till made payable to himself or order."

Under the doctrine thus announced by the supreme court, it must be held that the bonds, which remain payable in blank, are in fact payable to bearer, and the plaintiff bank does not sue thereon as an assignee of another; and therefore jurisdiction exists in the case of all the bonds which remain payable in blank, or in which the blank has been filled by the insertion of the name of the plaintiff.

Coming to the merits of the cases, it appears that the only question involved is whether the bonds sued on, or any part thereof, are invalid because issued in contravention of section 3 of article 11 of the constitution of Iowa, which provides that:

"No county or other political or municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness."

Under the facts of these cases, the question arises whether the value of the taxable property of the county, upon which the 5 per cent. is to be calculated in determining the amount for which the county could create a valid indebtedness, should be held to include or exclude the exemption under what are known as the "Tree Culture Acts" of the legislature of the state of Iowa. The law in force at the date when the bonds sued on were issued is found in section 1272 of McClain's Code of Iowa for 1888, and reads as follows:

"Sec. 1272. Forest and Fruit Trees. For every acre of forest trees planted and cultivated for timber within the state, the trees thereon not being more than twelve feet apart and kept in a healthy condition, the sum of one hundred dollars shall be exempted from taxation upon the owner's assessment for ten years after each acre is so planted; provided, that such exemption be applied only to the realty owned by the party claiming the exemption, not to exceed each one hundred and sixty acres of land, upon which the trees are grown, and in a growing condition. For every acre of fruit trees planted and suitably cultivated within the state, the trees thereon not being more than thirty-three feet apart and kept in a healthy condition, the sum of fifty dollars shall be exempted from taxation upon the owner's assessment, for five years after each acre is planted. Such exemption shall be made by the assessor at the time of the annual assessment, upon satisfactory proof that the party claiming the same has complied with this section; and the assessor shall return to the board of equalization the name of each person claiming exemption, the quantity of lands planted to timber or fruit trees, and the amount deducted from the valuation of his property. Provided, that the amount so deducted shall not exceed one half of the valuation of the realty on which such exemption is claimed."

In section 1271 it is declared that "the following classes of property are not to be taxed, and they may be omitted from the assessments herein required"; and then follow eight classes of property, none of which include the exemptions allowed for tree culture under the provisions of section 1272. From the provisions of these two sections, it is made clear that the realty upon which the trees are cultivated is not intended to be exempted from valuation and assessment, either in whole or in part. If that had been the intent of the legislature, the land would have been included within the classes of property enumerated in section 1271; and, furthermore, the exemption would have been of the land, or a certain proportion of it, instead of a given amount of money. Section 1272 declares that the exemption shall be deducted from the

assessment of the owner of the land, and shall not exceed one-half of the valuation of the realty on which the exemption is claimed. To meet the requirements of the section, it is incumbent on the assessor to place a valuation on (that is, to assess) all the land owned by the party claiming the exemption; then to ascertain and return the quantity of land planted in forest and fruit trees, with the deduction allowed therefor. As the section expressly provides that the deduction must not exceed one-half of the valuation of the realty on which the exemption is claimed, it is clear that the statute requires all the land to be valued by the assessor. Having thus ascertained the value of the land for the purposes of taxation, then the assessor is authorized to deduct from the total sum which would otherwise be entered against the landowner as the amount of his assessment the amount of the exemption allowed under the section in question. The evidence shows that, in making out the tax lists for the defendant county, it was the custom to enter in one column the number of acres owned by each person, in the next column the value of the land, in the next the value of the personalty, in the next the amount of exemptions for trees, and in the next the value for taxation; being the difference left after deducting the amount of the exemption allowed from the total valuation of the realty and personalty. Thus, we have presented the question whether the amount of the constitutional limitation is to be determined by taking 5 per cent. of the total valuation of the property as it is shown on the tax list, or by taking 5 per cent. of the assessment returned against the property owners. The language of the constitution is "five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists." If section 1272 exempted from taxation a named number of acres, out of a larger number devoted to tree culture, then the value of these would not be included in the taxable property of the county; but that is not the fact. The statute requires the assessor to place upon the tax list, and to value for taxing purposes, all the lands, regardless of the fact that a portion thereof may be devoted to tree culture. This being done, then, if the owner claims an exemption for tree culture, the assessor must ascertain the facts, and determine whether the property owner is entitled to a deduction. If the exemption is allowed, no part of the property is declared nonassessable, nor is the valuation placed thereon reduced in amount upon the tax list, but the total amount of the assessment against the owner for realty and personalty is reduced by the deduction of the exemption allowed. In effect, this is but the payment of a bounty to landowners, to encourage the culture and growth of trees. The constitutional provision requires the ascertainment of the value of the taxable property in the county, and not the amount of the assessments entered up against the property owners. All the land in the defendant county, including that devoted to tree culture, was liable to taxation during the years when the bonds sued on were issued, except such as was exempt under section 1271; and the assessors were bound, under the law, to assess the valuation thereof, regardless of the question whether any portion was planted in trees or not; and this valuation was required to be, and was in fact, entered upon the tax lists as the assessable value of the land. Under these circumstances, it seems clear that

it is this assessed value of the realty and personalty as shown upon the tax lists that must be resorted to in determining the value of the taxable property in the county as the basis for ascertaining the limit of lawful indebtedness incurable by the county. Counsel have not cited any decision by the supreme court of Iowa upon the proper construction of this clause of the constitution; and, in the absence of a ruling of that court upon the question, I shall hold, as indicated, that the value of the taxable property in the county includes the valuation put on the realty and personalty in the tax lists, without deducting therefrom any amounts allowed to the property owners as exemption under the tree culture acts.

The next and perhaps the most material question arising in the cases is whether, in ascertaining the amount of indebtedness outstanding against the county at the several dates when the bonds sued on were issued, the series of bonds issued under date of July 1, 1879, to the amount of \$100,000, and known as the "Shade Bonds," are to be recognized as existing claims against the county; for, if they are to be included in the outstanding indebtedness of the county, then the limit had been exceeded before any of the bonds sued on were issued. The facts show that this issue was itself in excess of the constitutional limit, and therefore these bonds did not create a valid or enforceable indebtedness against the county; and in the case of *Lyon Co. v. Ashuelot Nat. Bank*, 30 C. C. A. 582, 87 Fed. 137, it was held by the circuit court of appeals for this circuit that the fact that in 1885 these bonds were retired by the proceeds of another series of bonds issued and sold by the county would not validate the Shade bonds as of any date prior to the date of their payment; and, under the ruling in this case, it is clear that the Shade bonds cannot be included as part of the indebtedness existing when the bonds sued on were issued, as they all bear date before May 1, 1885, and the Shade bonds were not taken up, as above stated, until after that time.

It is admitted by counsel for the defendant county that, if the Shade bonds are not to be computed as part of the existing indebtedness of the county, then no defense exists to the bonds issued June 1, 1880, and September 6, 1881; and therefore the next inquiry is as to the validity of the issue of June 13, 1882. At this date the total value of the property in Lyon county for the purposes of taxation was the sum of \$1,149,773; being the total valuation of the taxable property as shown by the tax lists for 1881, without deducting therefrom the exemptions allowed for tree culture. Upon this basis the limit of indebtedness would be the sum of \$57,488.65, or, if the 5 per cent. be calculated on the sum left after deducting the tree culture exemptions, the limit would be the sum of \$48,912.95. On behalf of the defendant it is claimed that there were outstanding on June 13, 1882, unpaid warrants to the amount of \$15,225, which amount is not in dispute, and that in addition thereto there should be counted warrants to the amount of \$3,244, which it is claimed the evidence shows were issued for claims that were in existence before June 13, 1882, the date of the bonds now in issue, although the warrants bear dates subsequent to that time. Thus, the question arises whether unliquidated claims which have not been presented for allowance to the county board of supervisors can be included in the ex-

isting indebtedness of the county, in determining whether the debt limit had been reached on a given date. Must a person, when about to purchase an issue of county bonds, ascertain, at his peril, every possible claim which may thereafter be presented to the county board and be allowed? If so, no one can ever know whether he may safely purchase the bonds or not, for it is impossible for him to interrogate every person who might hold a claim; and, furthermore, if the person, although he had a claim, should deny it, the would-be purchaser could not rely on the denial, for that would not be binding upon the county, and, if he bought the bonds, the validity could be questioned by the county, upon the showing that the person inquired of in fact did have or hold a claim, which was subsequently allowed, of an amount sufficient to invalidate the bonds. If it be held that claims against a county which have never been filed in any county office, which have never been presented to the county board for allowance, of which no record can be found in any county office, can be subsequently relied upon to defeat the validity of bonds otherwise legal and binding, then it is made impossible for a purchaser ever to ascertain whether the bonds offered him are valid or not. Such a construction of the law would practically defeat the purpose and intent of the statutes authorizing counties to issue negotiable bonds; for it would render their validity so uncertain that no purchasers could be found, except at figures so low as to work the financial ruin of the county. The rule to be followed is that enunciated by the supreme court in *U. S. v. Kirby*, 7 Wall. 482, wherein it is said:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd result. It will always be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

The Code of Iowa (section 3528) enacts that:

"No action shall be brought against any county on an unliquidated demand, until the same has been presented to such board and payment demanded and refused or neglected."

The practice is to file the claims, duly sworn to, with the county auditor, who is, *ex officio*, the clerk of the board of supervisors, and then the same come before the board for its action. By thus invoking the action of the county board, a claim is asserted against the county, and in such form that notice thereof can be taken by all interested. Until a claim is thus presented, it cannot be known whether the holder thereof will ever present it or seek to assert it. Can it be fairly said, within the meaning of the constitution, that a county is indebted on a claim which the holder thereof has never presented against the county, and which the county board has never acted upon and allowed, or refused to allow? Until presented for allowance to the county board, the claim is one upon which no action can be maintained in a court, and for which no payment can be made from the county funds. Is a purchaser of county bonds compelled, at his peril, to take notice of inchoate claims of this character, which may never ripen into enforceable debts, and of the amount of which he cannot possibly obtain accurate knowledge? To so hold would make it impossible for the county officers, or a proposed purchaser of county bonds, to determine the amount of the

county indebtedness at any given date, and thus it would be made impossible to determine the amount of the indebtedness which could be lawfully created at any given time. To avoid this difficulty, and the injurious results flowing therefrom, it must be held that, so far as unliquidated claims are concerned, they cannot be deemed to be debts, within the constitutional limitation, until the holder has taken steps to assert the claim against the county by presenting it for allowance, and has thereby made it possible to ascertain from the county records the amount of the claim asserted against the county. There may be cases which should be held to be exceptions to this rule, owing to the fact that the existence of the claim was a matter of public notoriety; but such ground of exception does not exist with respect to the claims now under consideration, and therefore it cannot be held that the unliquidated claims not presented for allowance until after the issuance of the bonds sued on should be taken into consideration in determining the amount of the county indebtedness at the date of the issuance of the bonds.

According to the claim of the defendant in the brief filed, the amount of the bonds outstanding on June 13, 1882, was \$133,400, which amount includes the Shade issue of \$100,000, which, as already stated, cannot be included in the computation; and thus the amount is reduced to \$33,400. It is further admitted that, of this amount, the evidence shows that \$2,400 had been canceled before June 13, 1882; and thus the amount of bonds outstanding at that date is reduced to \$31,000. Adding to this amount the warrants claimed to be outstanding at that date, and we have a total of \$46,225 as the debt of the county on June 13, 1882, not including the \$9,000 of bonds issued under that date, which being added would make the total \$55,225, or an amount within the constitutional limit, if the 5 per cent. is to be calculated on the basis of the valuation of the taxable property of the county, without deducting the allowances made to the property owners under the tree culture acts.

The next issue of bonds was that of September 1, 1884, amounting to \$3,100. The tax list for 1883 shows that the value of the taxable property in the county for that year was the sum of \$1,561,471, or, excluding the allowances under the tree culture acts, the sum of \$1,384,289. Upon the former basis the debt limit would be \$78,073.55, and upon the latter, \$69,214.45. According to the contention of defendant's counsel, the number of bonds outstanding on September 1, 1884, exclusive of the Shade bonds, was \$42,400, and of warrants, \$25,850, or a total of \$68,250; but from this total must be subtracted the amount of the bonds which had been paid and canceled before September 1, 1884, amounting to \$4,300, which leaves a total of \$63,950, and adding thereto the bonds issued on that date would bring the final total up to \$67,050, or a sum clearly within the limit, whether calculated on the basis of excluding or including the tree culture allowances in the valuation of the taxable property of the county, and without making allowance for the warrants which had been exchanged for bonds up to that date.

We thus reach the last issue of bonds, being those issued under date of March 1, 1885, none of which are held by the Keene Five-Cent Sav-

ings Bank. The valuation of the taxable property of the county upon the last preceding tax list was at that date the sum of \$1,580,735, or, deducting the tree culture allowances, the sum would be \$1,437,527; thus making the 5 per cent. debt limit either \$79,036.75, or \$71,776.35, according to the basis of valuation adopted. At this time there were outstanding bonds to the sum of \$41,200, and warrants to the amount of \$29,466, or a total of \$70,660. It thus appears that the outstanding debt of the county had not reached the restrictive limit of the constitution when the county authorities determined to issue the series of bonds of which those held by the plaintiff Faulkner form part. The bonds were authorized and issued for the purpose of funding then existing and outstanding indebtedness. The evidence shows that part thereof were directly exchanged for outstanding warrants, and part were sold for cash, and the money was used in paying up other parts of the warrants of the county. The evidence fails to show that as a result of the issuance of this series of \$3,100 of bonds, and the retirement of the county warrants caused thereby, the debt of the county was so enlarged as to reach or exceed the constitutional limit. As the legislature has conferred full authority upon the county to issue negotiable bonds for the purpose of funding the pre-existing warrant debt, every presumption is in favor of the validity of the bonds issued by the county; and to defeat bonds thus issued, and held by innocent purchasers for value, on the ground that the issuance thereof caused the debt of the county to exceed the constitutional limit, the necessary facts must be clearly proven, the burden thereof being upon the defendant. *City of Huron v. Second Ward Sav. Bank*, 30 C. C. A. 38, 86 Fed. 272.

The conclusion reached is that in each case the bonds sued on must be held to be valid, and the plaintiff is entitled to judgment for the amount due upon the bonds and coupons sued on, except such coupons as had matured more than 10 years before these actions were brought; it having been decided by the supreme court in *Amy v. Dubuque*, 98 U. S. 470, that the statute of limitations is applicable to coupons, whether attached to or detached from the bonds with which they were issued. These suits were brought August 10, 1897, and therefore the statutory limitation of 10 years bars only the coupons that had matured before August 10, 1887, which includes coupons No. 14 of the bonds issued June 1, 1880, No. 10 of the issue of June 13, 1882, and No. 5 of the issue of September 1, 1884. Omitting these coupons, the amount due to the Keene Five-Cent Savings Bank, including the principal of the bonds, and interest thereon from the maturity of the bonds up to December 1, 1898, and the coupons, with interest from the maturity thereof to the date named, is the sum of \$33,275.20, for which amount judgment will be entered for plaintiff in that case. Upon the same basis, the total amount due to Eliza J. Faulkner is the sum of \$5,504.92, for which sum judgment will be entered in her favor in the second case.

DE ROUX et al. v. GIRARD.

(Circuit Court, E. D. Pennsylvania. December 17, 1898.)

No. 55.

1. COMPETENCY OF WITNESS—TRANSACTIONS WITH PERSONS SINCE DECEASED—ASSIGNMENT OF INTEREST BY PARTY.

Whether a plaintiff in a suit against executors can qualify himself to testify against the defendants as to transactions with, or statements by, the testator, under Rev. St. § 858, by an assignment of his interest in the suit *quære*.

2. SAME—GOOD FAITH OF TRANSFER—PENNSYLVANIA STATUTE.

Under the Pennsylvania statute which provides that a person otherwise incompetent as a witness shall become competent by a release or extinguishment in good faith of his interest, the question of the good faith of the transfer is a preliminary one for the court, and an assignment by a plaintiff, in a suit against executors, within two weeks of the time he is called as a witness, of a part of his interest in the suit to his wife in consideration of love and affection and one dollar, and of the remainder to his brother "for value received," will not be held to qualify such plaintiff to give testimony against the defendants intended to maintain an imputation of gross fraud on the part of the testator, and another also since deceased.

3. EQUITY PRACTICE—TAKING TESTIMONY BEFORE EXAMINER—REFERRING QUESTIONS TO COURT.

The interruption of proceedings before an examiner for the purpose of obtaining the opinion of the court on questions raised is not, in general, to be encouraged, but ordinarily the objection should merely be noted and considered on the hearing.

Hearing on objections made to testimony offered before the examiner, and referred to the court.

C. B. Kilgore, for complainants.

J. Percy Keating and J. M. Gest, for respondent.

DALLAS, Circuit Judge. John Joseph Etienne Louis De Roux was called before the examiner as a witness on behalf of the complainants, and, as is stated in the brief submitted by their counsel, it was "proposed to prove by this witness that he was present when the deed was made by his uncle John Augustus Girard and others to his father and mother and Lemtilhaac and wife, dated December 26, 1857, and also that he was present when the purchase-money mortgage was made, and exactly how that mortgage was read to his parents before they signed; also that they could not read or speak English, that the clause including the coal lands of Madame De Roux was omitted when this paper was read, and that the mortgagors never knew that the coal lands were included in this mortgage, intended to be a purchase-money mortgage of other and separate lands, and that they knew [?] of the sale of the coal lands under this mortgage, nor did their heirs know of it until within two years of the present time." Upon the argument this offer was treated as having reference to transactions which occurred with Theodore Cuyler and John Augustus Girard, both of whom are deceased, and upon this understanding it will be disposed of.

Section 858 of the Revised Statutes provides:

"That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement

by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

The case presented manifestly falls within the terms of this provision. The witness produced is a party plaintiff, and he is called to testify as to transactions with or by the testator or intestate of parties defendant; and it seems to be practically conceded that the objection made before the examiner was well taken, unless met and overcome by showing that the witness had assigned all his interest in this suit and its subject-matter, for the ground upon which it has been contended that the offer should be received is (I quote from complainants' brief) "that the witness had no interest in the case, his interest having been assigned on the 20th of October, 1898, and the case was already marked to the use of another." The two assignments thus referred to were produced in court, and are now before me. It is, at least, questionable whether, under the section of the Revised Statutes to which I have referred, a party may, by any assignment of his interest, be rendered competent to testify to any transaction with or statement by the testator or intestate in an action by or against executors or administrators; but, waiving this question, and assuming, as counsel for plaintiffs has assumed, that the Pennsylvania statute which provides that a person otherwise incompetent shall become competent by a release or extinguishment in good faith of his interest is applicable to the case here presented, and also that, if applicable, it is to be regarded as a rule of decision in this court, yet I am of opinion that the assignments which have been produced cannot be held to have been made in good faith, within the meaning of the provision. They were both made at one time, and only about two weeks before the assignor was called. One is to his wife, and the other is to his brother. The first is expressed to be "in consideration of love and affection, and for and in consideration of one dollar"; and the second to be "for value received," without any more specific statement of the actual consideration. It is obvious, I think, that the object in making these assignments was not to make a sale for a substantial price, but, if possible, to qualify the witness to testify upon a subject as to which the law expressly commands that he shall not be allowed to testify. The act of the general assembly of Pennsylvania of May 23, 1887, to which I have referred, makes the question of good faith a preliminary one to be decided by the trial judge. In this respect that act is but declaratory of the law as it had been long before laid down by Chief Justice Gibson in *Post v. Avery*, 5 Watts & S. 510, who, with reference to the duty of the court, and the manner in which that duty should be performed, said:

"Something must be left to the discretion of the judge, who will take care to be satisfied that the true purpose of the assignment is an actual sale for a substantial price; and this by the plaintiff's answers on his *voir dire*, or by evidence aliunde. Where, however, the transaction passes in the face of the court, the party being at his last shift, there will be no room for evidence in explanation of it. Such a case carries with it its own condemnation. In doubtful cases the burthen of proof will lie on the party attempting to get rid of the interest, and it will be incumbent on him to clear his motive from suspicion."

In the present case the proceeding before the examiner is, substantially, "in the face of the court," and, moreover, the assignor has done nothing "to clear his motive from suspicion."

The interruption of proceedings before an examiner for the purpose of obtaining the opinion of the court upon questions raised during their progress, is not, in general, to be encouraged. Ordinarily, it is much to be preferred that the objections should be merely noted, and their consideration be postponed until the hearing. The point in this instance is, however, so distinctly presented, and is, in my opinion, so free from difficulty, that I deem it proper to decide it at once, especially in view of the fact that the evidence proposed has for its object the maintenance of an imputation of a gross fraud charged to have been perpetrated by persons whose lips have been closed by death. The examiner is instructed to decline to take the testimony proposed by the offer referred to the court.

CALLAHAN v. HICKS et al.

CALLAHAN et ux. v. SAME.

(Circuit Court, W. D. Virginia. December 9, 1898.)

1. APPEARANCE—CURING DEFECTIVE PROCESS.

A plaintiff cannot object to the jurisdiction of a federal court over a cause removed from a state court on the ground that the proceedings for bringing the defendants into the state court were irregular, where the defendants appeared, and, after removing the cause, filed answers.

2. SAME—DOMICILE OF DEFENDANT—WAIVER OF OBJECTIONS.

The provision of the judiciary act exempting a defendant from being sued in any district other than that of his domicile is for his benefit, and may be waived by him; and, if he makes no objection to the jurisdiction of the court on that ground, the plaintiff cannot, nor is the court ousted of jurisdiction.

3. DISMISSAL—RIGHT OF PLAINTIFF—CROSS BILL.

A plaintiff is not entitled as a matter of right to dismiss his bill, where defendants have appeared, and by appropriate pleading asked affirmative relief; and such dismissal will not be permitted, where it would be inequitable to defendants.

On Motion to Dismiss.

John H. Dinneen, for plaintiffs.

Julian Meade, for defendants.

PAUL, District Judge. The plaintiffs in these causes move to dismiss the same on the ground that this court is without jurisdiction to entertain these suits. On the 21st of June, 1893, M. M. Callahan, the plaintiff in the first cause, in her own name instituted a chancery suit in the circuit court of Wythe county, Va., against the defendants, Benjamin E. and George E. Hicks, who are spoken of in the pleadings as Hicks Bros., and who will be so designated herein. Hicks Bros. were nonresidents of the state of Virginia, and were proceeded against by an order of publication, under the statute law of Virginia. The object of the suit, as alleged, was to subject a certain tract of land, containing 131 acres, conveyed by the plaintiff and her husband, C. W. Callahan, to

the defendants, to the payment of \$4,083.32; being the balance of purchase money due on said land by the defendants to the plaintiff. On petition filed by the defendants in the state court, the cause was removed into this court. After the removal of the cause the defendants filed their answer to the bill, in which they alleged that the plaintiff M. M. Callahan was merely a nominal plaintiff; that the substantial interest in the suit was in her husband, C. W. Callahan; that the bonds on which the suit was based were executed, not to said M. M. Callahan, but to her husband, C. W. Callahan. The answer further alleged that said bonds were procured by fraud; that said C. W. Callahan had induced said defendants to join him in the purchase of a tract of land in Wythe county, Va., in which the defendants were to have an interest of three-fourths, and said Callahan an interest of one-fourth; that said Callahan represented that the land had cost \$13,500; that the three-quarters interest of the defendants would cost them \$10,126, whereas in truth said Callahan had agreed with one Allen to purchase said land at the price of \$10,000. The answer further averred that the defendants, acting on the representations of said C. W. Callahan, had made a cash payment to said Callahan of \$4,000, and had paid the first of three bonds which they had executed for the deferred payments, of \$2,041.66 each. The defendants asked that their answer be treated as a cross bill; that the said C. W. Callahan be made party defendant thereto; that the deed from said C. W. Callahan and wife to the defendants, and the two remaining bonds, for \$2,041.66 each, executed by the defendants for the deferred payments on their supposed three-quarters interest in said land, be declared void; and that the same be annulled and canceled. On this cross bill, process issued against said C. W. Callahan; and the same being returned executed, and no appearance being entered, at the March term, 1894, of this court, a decree was entered canceling and rescinding the deed from said C. W. Callahan and wife to said Benjamin E. and George E. Hicks, and canceling the last two bonds, of \$2,041.66 each, for the deferred payments, and further decreeing a recovery by said Hicks Bros. of said C. W. Callahan of the sum of \$6,041.66, the amount of purchase money paid to said C. W. Callahan. This cause remained in this condition until the 2d day of March, 1898. On that day said C. W. Callahan and M. M. Callahan, his wife, the plaintiffs in the second cause, filed their bill in this court, praying an injunction against the enforcement of said decree of March term, 1894, in the cause of M. M. Callahan against Hicks Bros., and praying that the same be set aside and annulled on the ground that no process had been served on said C. W. Callahan, requiring him to answer the cross bill filed by Hicks Bros. The bill recites the history of the sale of the land bought of Allen, to the Hicks Bros., the cash payment made by Hicks Bros., their payment of the first bond for the deferred payments, and alleges that said C. W. Callahan was not interested in the suit of M. M. Callahan against Hicks Bros., and that he could not be amenable to any decree entered in that cause. To this bill Hicks Bros. filed their answer, setting up the same defenses they had made to the bill filed against them by M. M. Callahan. On the 15th of March, 1898, the following decrees were entered, without opposition from counsel,—the first being in the handwriting of the attorney for the

plaintiffs, Callahan and wife; the second, in the handwriting of the attorney for Hicks Bros.:

"M. M. Callahan vs. Benjamin E. Hicks and Geo. E. Hicks, and C. W. Callahan and M. M. Callahan vs. Benjamin E. Hicks and Geo. E. Hicks.

"In Equity.

"It appearing to the court that the parties to these two causes are the same, and that the subject-matters thereof are so intimately related that the interests of justice as well as the rights of the parties require that they should be heard and decided together, it is thereupon, by the United States circuit court in and for the Western district of Virginia, this 15th day of March, 1898, adjudged, ordered, and decreed that these two causes be henceforth heard together, and that all proceedings, orders, and decrees had and taken in either case shall be read and considered as having been taken in the other case."

"M. M. Callahan vs. Geo. E. and B. E. Hicks, and C. W. and M. M. Callahan vs. Geo. E. and B. E. Hicks.

"These two causes came on again to be heard upon the papers heretofore read in said causes, and the answer of G. E. and B. E. Hicks to the bill in said causes of C. W. and M. M. Callahan, which by leave of the court is allowed to be filed therein, and was argued by counsel. On consideration whereof, it appearing to the court that the process to answer the cross bill in said cause of M. M. Callahan vs. said Hicks was not in fact served upon said C. W. Callahan, who is a party to this cause, but upon another man bearing his name, it is ordered that the said decree against C. W. & M. M. Callahan of March 16, 1894, be, and is hereby, annulled and set aside, but without prejudice to the rights and remedies of any party to either of said causes, but leaving them just as they existed before said decree was entered. Upon request of counsel for said parties, it is further ordered that this cause be removed to this court at Danville, to be further proceeded in at that place, and it is ordered that the papers in said two causes be sent to Danville by the clerk of this court."

Counsel for the plaintiffs on this motion to dismiss asserts that the proceedings in the state court in the suit of M. M. Callahan v. Hicks Bros. was irregular, in the proceedings necessary to make Hicks Bros. parties defendant to that suit. Whatever irregularities there may have been in that suit,—and the court finds none,—they were cured by the appearance of Hicks Bros., and filing their petition for removal of the cause into this court, and filing their answer after removal. They were the only parties who could have made such objection. They found none, and the plaintiff M. M. Callahan will not be allowed to make it after having invoked the jurisdiction of the state court.

The main ground on which counsel for Callahan and wife insists that this court is without jurisdiction in the cause in which they are joint plaintiffs is that neither the plaintiffs nor the defendants are citizens of this district; that the plaintiffs being citizens of the state of Maryland, and the defendants citizens of the state of New York, the diverse citizenship necessary to give this court jurisdiction does not exist. This contention is based on that clause of the judiciary act of March 3, 1887, as amended by the act of August 13, 1888, which provides that "no civil suit shall be brought in the circuit courts of the United States against any person, by any original process or proceeding in any other district than that whereof he is an inhabitant." It has been frequently decided by the supreme court that this provision of the statute exempting a defendant from being sued in a district other than that in which he has his domicile may be waived by him, and that, if he wishes to

avail himself of the statutory exemption, he must do so by proper plea or motion. In *Ex parte Schollenberger*, 96 U. S. 369, the court said:

"The act of congress prescribing a place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

The same doctrine was held in *Bank v. Morgan*, 132 U. S. 141, 10 Sup. Ct. 37. In *Railway Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, the court, in passing on this question, said:

"Without multiplying authorities on this question, it is obvious that the party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit has been brought in the wrong district."

Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286, was a case in which the plaintiff in the circuit court was a corporation created under the laws of the state of New York, and the defendant a corporation created under the laws of the state of New Jersey. The defendant appeared and submitted itself to the jurisdiction of the court. In that case, as in the case at bar, both parties were nonresidents of the district in which the suit was brought. The supreme court said:

"Nor do we see any reason for a different conclusion as to the subject of waiver when the question arises where neither of the parties are residents of the district from that reached where the defendant only is not such resident."

In the cases before us the defendants, Hicks Bros., have raised no objection to the jurisdiction of this court. They appeared in the state court in the suit of M. M. Callahan against them, and invoked the jurisdiction of this court, by having the cause removed, and filed their answer after removal. When sued in this court by the plaintiffs, C. W. Callahan and wife, they appeared and filed their answer to the plaintiffs' bill, and thus waived the question of jurisdiction, if they had a right to raise it. But the plaintiffs seek to raise the question of jurisdiction, which the defendants have waived; and that, too, after the plaintiffs themselves have invoked the jurisdiction of the court, have without objection allowed the defendants to file their answer to the plaintiffs' bill, and after the decrees above of March 15, 1898, had been entered at a former term. The plaintiffs, C. W. Callahan and wife, having brought their suit in this court, and the defendants appearing, and by their answer waiving all objections that they might have taken to the plaintiffs' right to sue in this district, the plaintiffs cannot be heard to raise a question which the defendants alone had a right to raise, and which they waived by filing their answer to the merits.

The contention of the plaintiffs, Callahan and wife, that they have a right to dismiss their suit, and thus compel the defendants, Hicks Bros., in order to assert their claim, to bring a separate suit against the plaintiffs in the state of Maryland, cannot be maintained. The doctrine of the right of a plaintiff to dismiss his bill is thus stated (Fost. Fed. Prac. § 291):

"The plaintiff may dismiss his bill, without costs, at any time before the defendant's appearance. * * * After appearance, and before a decree or de-

cretal order, a plaintiff can usually obtain a dismissal upon payment of the costs of such of the defendants as have appeared, but not if they, or any of them, would be injured thereby. Leave to dismiss may be refused where the defendant claims affirmative relief by cross bill, or by answer in a case where he is entitled to affirmative relief on an answer."

The defendants in their answer claim affirmative relief. To permit the plaintiffs to dismiss their bill, and compel the defendants to bring a suit to establish against the plaintiffs the claim the defendants assert in their answer, would subject them to serious injury, should the plaintiffs rely on the plea of the statute of limitations, or assert some other defense to which they might resort. There would be neither reason nor justice in putting the defendants to a new suit to establish a claim that can be disposed of in the present litigation. *Stevens v. The Railroads*, 4 Fed. 97. *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602; *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594. In the last case the supreme court quotes from *Connor v. Drake*, 1 Ohio St. 170, as follows:

"The propriety of permitting a complainant to dismiss his bill is a matter within the sound discretion of the court, which discretion is to be exercised with reference to the rights of both parties,—as well the defendants as the complainants. After a defendant has been put to trouble in making his defense, if, in the progress of the case, rights have been manifested that he is entitled to claim, and which are valuable to him, it would be unjust to deprive him of them merely because the complainant might come to the conclusion that it would be for his interests to dismiss his bill. Such a mode of proceeding would be trifling with the court, as well as with the rights of defendants."

The authorities cited thoroughly sustain the defendants in their objection to a dismissal of these causes, and the motion to do so will be overruled.

PAINE v. UNITED STATES PLAYING-CARD CO.

(Circuit Court, D. New Jersey. December 17, 1898.)

PRELIMINARY INJUNCTION—SUFFICIENCY OF SHOWING.

A preliminary injunction will not be granted where it appears, from the moving papers and answering affidavits, not only that plaintiff's right to the injunction is not clear, but that there are substantive matters of defense, which ought not to be tried on ex parte affidavits, and it is further shown that the defendant is financially responsible.

On Motion for Preliminary Injunction.

Fred L. Chappell, for complainant.

A. V. Brieson, for defendant.

KIRKPATRICK, District Judge. The bill of complaint in this cause is filed by Cassius M. Paine against the United States Playing-Card Company, seeking, by way of preliminary injunction, the enforcement of the terms of a contract entered into in 1892 between the complainant and the National Card Company. The clause of the contract under which the relief is sought is as follows:

"Said second party [meaning the National Card Company] contracts and agrees that during the life of this contract it will not, directly or indirectly, handle, manufacture, or sell any other apparatus, method, or system for duplicate whist."

The bill alleges that:

"The said National Card Company, after entering into said contract with your orator, merged itself, with other playing-card companies, into a new corporation, organized under the laws of the state of New Jersey, which is the defendant herein, and known as the 'United States Playing-Card Company.'"

What the terms of the merger were, or whether the contracts and obligations of the National Card Company were transferred or assumed by the United States Playing-Card Company, is not set forth. The answering affidavits of the defendant company deny that any such transfer or assumption of the particular contract was made, and go so far as to deny the merger as set out in the bill and affidavit of the complainant which is annexed to same. An effort has been made to show that the defendant was acquainted with the contents and terms of the contract made with the National Card Company. That may be admitted, and yet the moving papers be free from conclusive proof of its assumption. It may be true that the defendant has manufactured and is manufacturing the complainant's system of duplicate whist, but in so doing it may be but a tortfeasor. If it were otherwise, and it were assumed that the defendant was as much bound by the contract as the National Card Company, a perusal of the contract, and an examination and consideration of the moving papers and answering affidavits, reveal so many substantive matters of defense that I do not feel they ought to be determined upon a motion for a preliminary injunction. Not only is the right of the complainant to hold the defendant herein to a performance of the contract not clearly shown, but serious objections are raised as to the validity of the contract itself,—whether it is not void for failure of consideration, or as being contrary to public policy, and whether, if valid, it has not by its terms expired. These are questions that ought not to be decided upon ex parte affidavits, nor until the parties have had opportunity to present to the court the fullest proof respecting the same. The defendant corporation is represented to be of the largest financial responsibility, and it is questionable whether an action at law would not afford the complainant all the relief to which he may be entitled. To grant an injunction at this time would be to determine in advance, in favor of the complainant, all the disputed questions in the case, without giving the defendant an opportunity to be heard. The interference of the court by way of injunction does not seem necessary to preserve any right which the complainant may have. The injury which might be done the defendant through the stoppage of its business, for which it could recover no compensation, would far exceed any benefit to be derived by the complainant thereby. The motion for a preliminary injunction will be denied.

NATIONAL BANK OF COMMERCE IN DENVER v. ALLEN et al.

(Circuit Court of Appeals, Eighth Circuit. October 31, 1898.)

No. 1,037.

1 CORPORATIONS—POWERS—INDORSEMENT OF NOTES.

A corporation organized to carry on a mercantile business has power to indorse notes of a third person from whom it buys merchandise in payment for such merchandise.

2. SAME—LIABILITY OF ONE CORPORATION FOR ACTS OF ANOTHER—AGENCY.

Neither the fact that a bank held as collateral security a majority of the stock of a mercantile corporation, nor that one of its officers was for a time a director of the mercantile company, renders the latter the agent of the bank, so as to make the bank liable to creditors of the company for misrepresentations as to its financial condition made by its officers.

3. SAME—INSOLVENCY—POWER TO PREFER CREDITORS.

A private business corporation has the same power to prefer creditors as an individual, and, though insolvent, so long as it retains the custody and control of its property may dispose of the same so as to pay the claims of one or more of its creditors, to the total exclusion of other equally meritorious claims.

4. SAME—STOCKHOLDERS—RIGHT OF PLEDGOR TO VOTE.

Under 1 Mill's Ann. St. Colo. §§ 495, 496, which authorize persons holding stock in a corporation as trustees to vote the same, but provide that a pledgor may vote the stock pledged, one to whom stock has been transferred to hold as collateral security for an indebtedness to a third party is not a trustee, but the transaction is, in effect, a pledge, and, in the absence of express agreement, the pledgor is entitled to vote the stock.

5. SAME—PREFERENCE OF CREDITORS—UNDUE INFLUENCE.

A bank is not required to give notice of a claim against a mercantile corporation, or the amount of such claim, nor does the fact that it exercises the moral influence which it possesses over the company as a large creditor, to induce it to grant a preference, render it liable to other creditors for the amount received in payment of its claims, where it had no actual control over the action of the company.

6. JURISDICTION OF FEDERAL COURTS—INTERVENTION IN CREDITORS' SUIT—AMOUNT OF CLAIM.

Where a judgment creditor whose judgment exceeds \$2,000 has filed a creditors' bill in a federal court in behalf of himself and all other creditors who desire to come in, to reach and subject a special fund alleged to have been acquired by a third party in fraud of the rights of the creditors of the judgment defendant, and the court has acquired jurisdiction over such fund, it has jurisdiction to entertain a petition of intervention by another creditor desiring to become a party to the bill, and claiming an interest in the fund, though the amount of his judgment is less than \$2,000.

7. SAME—LIMITATION OF JUDICIARY ACT.

The provision of the judiciary act limiting the right to sue in a federal court to cases which involve \$2,000, exclusive of interest and costs, does not apply to a case where a judgment creditor intervenes and becomes a party to a creditors' bill already filed by a judgment creditor whose judgment exceeds the jurisdictional amount, in behalf of himself and all other creditors similarly situated who desire to come in.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a creditors' bill, which was exhibited by George A. Allen and others, the appellees, composing the firm of Paris, Allen & Co., against the National Bank of Commerce in Denver, the appellant, and against the A. K. Clarke Mercantile Company, hereafter termed the "Mercantile Company." The bill was filed by Paris, Allen & Co., as judgment creditors of the Mercantile Company, for their own benefit, and for the benefit of such other

judgment creditors of the Mercantile Company as might thereafter join in the proceeding and contribute to the expense thereof; whereupon several other judgment creditors of the Mercantile Company did unite in the proceedings and become parties complainant.

The relief sought is based upon grounds set forth in the bill of complaint, which may be summarized as follows: The Mercantile Company was organized on or about April 26, 1893, under the laws of the state of Colorado, for the ostensible purpose of acquiring and succeeding to the business of A. K. Clarke, who for some time previously had been engaged in the wholesale and retail liquor business in the city of Denver, Colo., which business was transacted in the name of A. K. Clarke & Co. The capital of the Mercantile Company was fixed at \$200,000, consisting of 2,000 shares, of the par value of \$100 each, and the stock was all issued to said Clarke and two other persons by him designated, as full-paid stock, in exchange for the stock of liquors, warehouse receipts, and other property formerly belonging to said Clarke. 1,998 shares of said stock were issued to Clarke personally, and 1 share each to two other persons, who forthwith became directors and officers of the corporation. Clarke was at the time indebted to the National Bank of Commerce in Denver, the appellant, in the sum of \$50,000, and he forthwith assigned the 1,998 shares of stock in the Mercantile Company to said bank, as collateral security for his individual indebtedness. Immediately upon its organization the Mercantile Company engaged in the wholesale liquor business at the place formerly occupied by Clarke, and continued to transact such business until January 10, 1895, and in the meantime became indebted to the firm of Paris, Allen & Co., for liquors purchased, in the sum of \$3,250, and to the other complainants as well, the total indebtedness aggregating about \$20,000. The aforesaid indebtedness was contracted with the full knowledge of the National Bank of Commerce in Denver, hereafter termed the "Bank," which was acquainted with the purchases that were from time to time made by the Mercantile Company. Upon its organization the Mercantile Company guaranteed and indorsed the individual obligations of said Clarke to the bank; doing so, as the bill alleged, without consideration, and for the purpose of creating a fictitious indebtedness from the Mercantile Company to the bank. On or about January 10, 1895, the Mercantile Company sold and transferred its property and assets to another corporation, called the "Colorado Mercantile Company," for the sum of \$50,000, the whole of which sum, when received, was paid to the defendant bank. The complainants below further charged, on information and belief, that the Mercantile Company was organized for the purpose of enabling Clarke to avoid the payment of his individual debts, amounting at the time to \$50,000; that the sale by the Mercantile Company to the Colorado Mercantile Company, in January, 1895, was made for the sole purpose of enabling the vendor to avoid the payment of its just debts, particularly the several debts due to the complainants, and for the purpose of hindering and delaying its creditors in the collection of their debts, and to secure the payment of the indebtedness due from Clarke individually to the bank; and that by the sale made by Clarke to the Clarke Mercantile Company, and by the assignment of Clarke's 1,998 shares of stock to the defendant bank, as collateral security, the bank became the sole owner of the property of the Mercantile Company, and conducted the wholesale liquor business in the name of the latter company, for its sole use and benefit, from April, 1893, until the sale in January, 1895, to the Colorado Mercantile Company. The complainants also charged that during the last-mentioned period the bank, acting in the name of the Clarke Mercantile Company, published to the commercial world that the stock of said company had been fully paid up by the sale and transfer of Clarke's stock of goods to said company; that the value of the property and assets of said company exceeded \$115,000; that its debts did not exceed \$10,000; that the foregoing statements were made for the purpose of deceiving persons who had dealings with the Mercantile Company, and to induce such persons to sell goods to said company; that thereby the complainants were in fact induced to sell goods to the Mercantile Company, shortly prior to the sale of its business to the Colorado Mercantile Company, which goods were on hand at the time of said sale; and that the proceeds thereof, on the occasion of such sale, were paid to and received by the defendant bank, and were still held by it. They further charged that the Mercantile Company

was at no time indebted to the bank in a sum exceeding \$10,000. It was finally charged that the business aforesaid was conducted in the manner aforesaid,—that is to say, by the bank in the name of the Clarke Mercantile Company,—“for the purpose of covering and concealing a secret trust in favor of the said respondent bank, and for the purpose of hindering, delaying, and defrauding the creditors of said respondent company, and particularly your orators, in the collection of their just claims and demands against the said respondent company.”

The bank, by its answer, denied, in substance, that the Mercantile Company had ever been its agent for the transaction of any business, or that it had ever transacted any business in the name of that company, or that it had ever made any statements to the commercial world such as were imputed to it in the bill of complaint, to the effect that the stock of the Mercantile Company was fully paid up, or concerning the value of its property and assets. It also denied in detail all other allegations contained in the bill which tended to show that it had become a party to any scheme to wrong or defraud the complainants or either of them. The case comes to this court on appeal from a decree in favor of the complainants below, which adjudged that the defendant bank should pay to the respective complainants the amount of their several demands against the Clarke Mercantile Company, all of which had been reduced to judgment, together with interest thereon at the rate of 8 per cent. per annum from and after November 2, 1895.

A. B. Seaman, for appellant.

Lucius M. Cuthbert (Henry T. Rogers and Daniel B. Ellis, on the brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is claimed in behalf of the appellees, who were the complainants below, that the Clarke Mercantile Company indorsed the individual notes of A. K. Clarke, which were at the time held and owned by the appellant, the National Bank of Commerce in Denver, without receiving any consideration therefor, and that the indorsements in question were for that reason *ultra vires* and void. On the assumption that the indorsements were without consideration, it seems to be further contended that, when the Mercantile Company discharged its liability to the bank on account of such indorsements by paying the notes, it acted wrongfully and in fraud of the rights of the appellees, and that the money so paid on account of the indorsements can be recovered by them from the bank, notwithstanding the admitted fact that none of the debts now due to the appellees were contracted by the Mercantile Company until more than a year after the indorsements were executed. We think it sufficient to say, concerning this contention of the appellees, that the proof does not support the charge that the indorsements were executed without consideration. The trial court was of the same opinion, and we fully concur in its views on that point. The record discloses that, at the first meeting of the directors of the Mercantile Company, Clarke proposed to sell and convey to said company his entire stock in trade, consisting of liquors, cigars, fixtures, and all other property, provided the company would issue to him its entire capital stock as full paid and nonassessable, and provided, further, that the company would indorse the notes of said Clarke to the National Bank of Com-

merce in Denver, in the sum of \$77,500, in consideration of the transaction. The proposition which was made by Clarke obligated him to further secure his notes to the bank by hypothecating a sufficient amount of the capital stock of the Mercantile Company, when the same was issued to him, but it was expressly stated in his proposition to the company that the indorsement of his notes to the bank should form a part of the consideration for the proposed transfer of his stock in trade to the Mercantile Company. This proposition on the part of Clarke was accepted; his stock in trade was conveyed to the Mercantile Company; its total capital stock was issued to Clarke, or to such persons as were by him designated to receive it; and two notes of Clarke, one for \$50,000 and one for \$27,500, which were then held by the bank, were forthwith indorsed by the Mercantile Company. Moreover, we find no reason to doubt that the bank at that time held, as collateral security, many warehouse receipts for goods which then formed a part of Clarke's stock in trade, and we think it is most probable that the bank surrendered such collateral to enable Clarke to transfer his property and business to the Mercantile Company. In view of these facts, we think that the Mercantile Company did receive a valuable consideration for the indorsement of Clarke's individual notes, and that the contention to the contrary is without merit. It may be that the creditors of the Mercantile Company, in a proper proceeding, would be able to show that by the transaction in question the par value of its stock was not fully paid, but there is no greater reason for saying that the notes were indorsed without consideration than there would be for asserting that nothing was paid on the capital stock. The transfer of the stock in trade and the indorsement of the notes formed a part of the same transaction, and the former act was the consideration for the latter. Nor do we perceive that there was any want of power on the part of the Mercantile Company to execute the indorsements. It was organized "to carry on a wholesale, retail, and jobbing liquor, cigar, and tobacco business," which involved the right to purchase the requisite stock of such articles, and it could purchase the same either by paying cash therefor, or by indorsing the outstanding paper of the party from whom it acquired them, if that method of payment was deemed satisfactory.

The appellees also predicate a right to relief on the ground that the appellant bank conducted a wholesale and retail liquor, cigar, and tobacco business under the name of the Clarke Mercantile Company, for the bank's exclusive use and benefit, and that while doing so it made certain false and fraudulent representations to the business world concerning the amount that had been paid on the stock of the Mercantile Company, and concerning its assets and liabilities, whereby the appellees were deceived and induced to extend credit to that company. This charge appears to be based on the following facts, and is in the nature of a legal inference therefrom: When the Mercantile Company was formed, Clarke became, and so long as it was engaged in business continued to be, its president and chief managing officer. Such purchases and sales as were thereafter made by the company were made under his supervision and direction. He was actively engaged in controlling the daily business transactions of the company from the

date of its organization until January 12, 1895, when the Mercantile Company sold its property and the good will of its business to the Colorado Mercantile Company. On the organization of the Mercantile Company, which appears to have taken place on May 26, 1893, 1,998 shares of stock were issued to Clarke, and 1 share each to Benjamin Harrison and John S. Fowler, who, together with Clarke, became the first board of directors. Clarke immediately transferred 1,988 shares of his stock to William B. Morrison, who was the appellant's assistant cashier, as collateral, to secure his individual indebtedness to the appellant bank, and that amount of stock thereafter stood in Morrison's name, with a notation upon the stock ledger that he held it as "trustee for collateral security." On September 21, 1893, William F. Dieter was elected a director of the Mercantile Company in place of Benjamin Harrison, who had resigned. Dieter thereafter served the company in the capacity of director and bookkeeper, he having been recommended for the latter situation to the president of the Mercantile Company by one of the directors of the appellant bank. On June 4, 1894, Morrison, who had then acquired in his own right the one share of stock originally issued to John S. Fowler, became a director of the Mercantile Company in lieu of said Fowler, but he does not appear to have taken an active part in the daily business transactions of the Mercantile Company, which were, in the main, conducted by Clarke, with the assistance of Dieter, the bookkeeper. On April 18, 1895, Morrison resigned from the board of directors, and his resignation was duly accepted. There is testimony in the record which tends to show that on or about June 10, 1893, Clarke stated, in substance, to a representative of R. G. Dun & Co., when he was requested to make a statement concerning the assets and liabilities of the Mercantile Company, that its total assets aggregated \$146,215.12; that the merchandise indebtedness which had been assumed by the company amounted to \$22,559.54; and that he (Clarke) owed individually \$76,500, which was secured by the hypothecation of his stock in the Mercantile Company. The testimony further shows that Dieter, the bookkeeper of the Mercantile Company, on March 30, 1894, handed to an agent of R. G. Dun & Co. another statement, showing that the total assets of the Mercantile Company at that time amounted to \$125,627.93, and its liabilities to \$10,000; but there is also evidence to the effect that the agent of R. G. Dun & Co., to whom the last-mentioned statement was furnished, well knew that the Mercantile Company was heavily indebted at the time to the appellant bank, and that such indebtedness had not been included in the aforesaid statement of its liabilities. While the evidence fully warrants the conclusion that the appellees were induced to credit the Mercantile Company on the strength of statements concerning its means and solvency that were circulated by various commercial agencies, and had been compiled from statements made by Clarke and Dieter, yet there is no evidence that such statements were made either by direction, or with the knowledge and sanction, of any of the managing officers of the appellant bank. The testimony further discloses that, after the Mercantile Company was formed, its business was generally conducted at a loss; that this was particularly the case in the season of 1894; that Clarke failed to induce certain parties, from whom he had been in the habit of purchasing goods,

to buy a part of his stock in the Mercantile Company and become interested in its business, as he had hoped to do when the company was formed; that having failed in the latter project, and the company being in great financial stress, Clarke, on or about January 1, 1895, resolved to sell the stock in trade of the Mercantile Company and the good will of its business, if he could find a purchaser for the same at a fair price; that he succeeded in finding a purchaser, and conferred with the officers of the appellant bank, which was the largest creditor of the Mercantile Company, concerning the proposed sale, and was aided and assisted by them to a large extent in the negotiations, which culminated, on January 12, 1895, in a sale to the Colorado Mercantile Company of the property and assets of the Mercantile Company for the sum of \$50,000 in cash; and that the money so received by the Mercantile Company on the sale of its property and good will was deposited by it in the appellant bank, where it was applied, with the consent of the Mercantile Company, to the payment of its indebtedness to the appellant bank, which then amounted to about \$78,000, including the balance unpaid on the individual indebtedness of Clarke, which had been indorsed by the Mercantile Company on the organization of that concern. Prior to January 12, 1895, it seems that \$13,111 had been paid on Clarke's individual note of \$27,500, which had been indorsed by the Mercantile Company; that said note had been canceled, and the balance due thereon had been included in another note of \$25,000, which was drawn by the Mercantile Company and indorsed by Clarke. The note for \$50,000, originally made by Clarke and indorsed by the Mercantile Company, appears to have been wholly unpaid on January 12, 1895, except such sums as may have been paid thereon in the way of interest.

Such, in brief, are the material facts on which the claim is based that the appellant bank transacted business in the name of the Mercantile Company, for its exclusive use and benefit, and that the representations aforesaid concerning that company's assets and liabilities were in fact made by the bank, and that the bank should be held accountable therefor.

We are of opinion, however, that the claim in question is not well founded. The Mercantile Company was a distinct legal entity, subject at all times to the control of its own officers, and it is clear, we think, that it did not become an agent of the bank either because Clarke hypothecated the bulk of its stock which he happened to own to secure a debt due to the bank, or because Morrison, an employé of the bank, served for a time on the board of directors of the Mercantile Company, or for both of these reasons combined. In a legal sense, a corporation does not become the agent of another, be it a corporation or an individual, because the latter holds a part of its stock in pledge to secure a debt; nor is the relation of principal and agent established, as between two corporations, because an officer or employé of one is a member of the board of directors of the other. It has even been held that, where the same person is acting as director in two corporations, knowledge acquired by him, while serving in the capacity of a director in one corporation, is not imputable to the other. *Thomp. Corp.* § 5214, and cases there cited. Moreover, while it may be conceded that one corporation may act as agent of another in a given transaction, or even

in a series of transactions, yet we do not understand it to be possible, for a corporation which has been incorporated to carry on a given business, to transact the whole of that business merely as the agent of, and for the exclusive benefit of, another. Ordinarily, a corporation is not even the agent of its own stockholders, in such a sense as to render them personally liable upon its contracts or for its wrongful or fraudulent acts, although its stockholders are entitled ultimately to the net profits realized from all corporate ventures; and it would be a strange result if the acquisition of stock in a corporation by one of its creditors, to be held as collateral security, or if the election of one of the creditor's employes to serve on its board of directors, should be held to place the corporation in the attitude of a mere agent. Such a conclusion is totally inadmissible. It is doubtless true, as has been suggested, that a large creditor of a corporation or of an individual, by virtue of being such, sometimes has such an influence over his debtor as enables him to control his actions in many ways; but this is a moral power, incident to the situation, which the law permits a creditor to exercise for his own benefit and advantage, even at the expense of other creditors, provided that he does not direct the doing of acts that are either illegal or fraudulent. The existence of such an influence, however, falls far short of establishing the relation of principal and agent, even where it is plain that it does exist and has been exercised. In the case at bar, it is obvious that the bank counseled and advised the Mercantile Company, through Clarke, its president, to sell its property and effects, and to apply the proceeds of the sale on the company's indebtedness to the bank; and it is very probable that the Mercantile Company was induced to a large extent, by such advice, to make the sale and such appropriation of the proceeds. But conceding this to have been the case, the transaction amounted to no more than a preference among creditors, all of whom had valid claims, and, considered by itself, we do not see that it gives the appellees any legal cause for complaint. It seems to be well settled in the state where the transaction took place, and in other jurisdictions as well, that a private business corporation, so long as it retains the custody and control of its property, may dispose of the same so as to pay the claims of one or more of its creditors, to the total exclusion of other equally meritorious claims, although it is at the time insolvent. In this respect a private business corporation has the same power to prefer creditors which is possessed by an individual. Its property and assets not being held in trust for equal distribution among all of its creditors, it may discriminate between them like a natural person, provided it pays honest debts and makes no distribution of its property among shareholders until all legal obligations to creditors have been discharged. *West v. Produce Co.*, 6 Colo. App. 467, 41 Pac. 829; *Burchinell v. Bennett* (Colo. App.) 52 Pac. 51; *Crymble v. Mulvaney*, 21 Colo. 293, 40 Pac. 499; *Sutton v. Dana*, 15 Colo. 98, 25 Pac. 90; *Gottlieb v. Miller*, 154 Ill. 44, 39 N. E. 992; *Henderson v. Trust Co.*, 143 Ind. 561, 40 N. E. 516; *Jewelry Co. v. Volfer*, 106 Ala. 205, 17 South. 525; *Hollins v. Iron Co.*, 150 U. S. 371, 382, 14 Sup. Ct. 127; *Railway v. Ham*, 114 U. S. 587, 5 Sup. Ct. 1081; *Graham v. Railroad Co.*, 102 U. S. 148, 160; *Fogg v. Blair*, 133 U. S. 534, 541, 10 Sup. Ct. 338; *Gould v. Railway Co.*, 52 Fed. 680.

In concluding the discussion on this branch of the case, it is proper to observe that if the charge was well founded that the appellant bank carried on business in the name of the Mercantile Company, and while doing so made false representations, which were productive of damage to the appellees, then it would follow that a court of law could afford adequate relief for the alleged wrong, and there would be no occasion for seeking relief in a court of equity.

It is further urged that the decree of the lower court, compelling the bank to pay the appellees' claims out of the money which it received from the Mercantile Company on the sale of its property and good will, can be sustained upon the theory that the bank had a secret lien on the property of the Mercantile Company, or what was tantamount thereto, which was fraudulent as to its other creditors. This claim is based altogether on the state of facts heretofore detailed. It is said, in substance, that the bank held 1,988 shares of the stock of the Mercantile Company by a title which authorized it to vote the stock at all corporate meetings; that Morrison and Dieter, two of the directors of the Mercantile Company, while serving on its board, were subject at all times to the orders of the bank; and that by these means the bank had acquired a control over the Mercantile Company which was as obnoxious to the law as an unrecorded mortgage or bill of sale covering all of that company's property and assets.

We think, however, that it is an erroneous view that the bank had the right to vote the stock which stood in the name of Morrison on the books of the Mercantile Company. The testimony shows without contradiction that Clarke was the real owner of that stock, and that it had been placed in Morrison's name merely as collateral security for Clarke's indebtedness to the bank, without any agreement between Clarke and the bank that while it was so held it should be voted by the latter. Under these circumstances, the right to vote the stock depends upon a local statute of Colorado (1 Mill's Ann. St. Colo. §§ 495, 496), which is as follows:

"Sec. 495. No person holding stock in any corporation as executor, administrator, conservator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such corporation, but the person pledging such stock shall be considered as holding the same and shall be liable as a stockholder accordingly, and the estate and funds in the hands of such executor, administrator, conservator, guardian or trustee, shall be liable in like manner and to the same extent as the testator or intestate, or the ward, or person interested in such trust funds would have been if he had been living and had been competent to act and held the stock in his own name.

"Sec. 496. Every executor, administrator, conservator, guardian or trustee shall represent the stock in his hands at all meetings of any such corporations and may vote accordingly as a stockholder, and every person who shall pledge his stock may nevertheless represent the same at all meetings and vote accordingly."

Reading both of these sections together, the term "trustee," as used in section 496, means, we think, a person who holds the legal title to stock for the benefit of some third party, who is the equitable owner thereof, and entitled to the dividends thereon, and whose property, whether held in trust or otherwise, is chargeable with whatever liability may result from the ownership of the stock. Persons holding

stock in trust for married women, minors, insane persons, spendthrifts, and the like would be included by the term "trustee," as used in section 496, supra; but a person in whose hands stock is placed by the real owner, to be held merely as collateral security for a debt due from himself to a third person, would not be so included. In cases of the latter sort, the stock involved is really held in pledge, and the right to vote the same, in the absence of an express agreement to the contrary, remains with the pledgor. *Brewster v. Hartley*, 37 Cal. 15-25. Such we understand to be the construction which has been placed upon the Colorado statute by the supreme court of that state, and similar views have been expressed elsewhere. *Miller v. Murray*, 17 Colo. 417, 30 Pac. 46; *Vowell v. Thompson*, 3 Cranch, C. C. 438, Fed. Cas. No. 17,023; *Hoppin v. Buffum*, 9 R. I. 513-518; *Allen v. Hill*, 16 Cal. 113; *Com. v. Dalzell*, 152 Pa. St. 217, 25 Atl. 535.

Concerning the charge that Morrison and Dieter, while serving on the board of directors of the Mercantile Company, were mere agents of the bank, we deem it sufficient to say: First, that both of these persons were duly qualified to serve as members of the board by their ownership, in their own right, of one share each of the stock of the Mercantile Company; and, in the second place, that we fail to find any evidence in the record which would justify a finding that Dieter was a special representative of the bank on the board of directors, and that he was unduly or unlawfully swayed by its influence. He was the bookkeeper of the Mercantile Company, and was employed for that purpose by its president. He devoted all of his time to its service, and was paid for his services by the company. In short, he bore no such relation to the bank as would indicate that it could or did control his actions in an unlawful manner. Indeed, when the facts of the case are fully analyzed, it will be found, we think, that the control which the bank exercised over the Mercantile Company was mainly due to the fact that it had made advances to the company and was its largest creditor. It was a moral influence, due to this circumstance, which the bank seems to have exerted over the Mercantile Company, rather than any legal power that it had acquired to control its actions or business policy. The directors of the Mercantile Company seem to have retained the power at all times to transact the corporate business as they deemed best, and two of them, at least (Clarke and Dieter), did not occupy such a relation to the bank as disabled them from exercising an independent judgment, or acting at all times as they thought proper.

We have already stated, in substance, that the evidence does not support the contention that the bank should be held responsible to the appellees for the statements which were made by Clarke and Dieter, relative to the financial condition of the Mercantile Company, and on this branch of the case it is proper to observe, further, that the testimony does not warrant the conclusion that the bank wrongfully concealed its relation as a creditor of the Mercantile Company, or resorted to any artifice to prevent such relation from becoming known. No statute of the state of Colorado, and no business usage of which we are aware, made it obligatory on the bank to give public notice of the amount of its claim against the Mercantile Company; and it goes

without saying that, in the absence of such a statute, its full duty was discharged by refraining from making any false statements or spreading any false reports concerning the amount of such indebtedness. In point of fact, the existence of the debt, and the proximate amount thereof, was known to some of the appellees as early as March 22, 1894; since the evidence shows that on that day some of the appellees were furnished with a statement by Bradstreet's Commercial Agency, which contained the information that the Mercantile Company owed a local bank in Denver about \$60,000, and that the stock of the Mercantile Company was hypothecated to secure such indebtedness, and was virtually owned by the pledgee.

In view of these considerations, we are unable to discover any reasons which will warrant a ruling that the control which the bank exercised over the Mercantile Company was tantamount to a secret lien on its property and for that reason fraudulent. Such influence as it exercised over the Mercantile Company it had acquired by means which the law esteems lawful. It concealed no fact which the law required it to make known. Moreover, it had no legal power to control the corporation, since the majority of that company's directors were under no obligations to the bank which can be assumed to have rendered them unduly subservient to its wishes.

In support of the proposition which is now under consideration, the appellees have invited our special attention to the case of *American Oak-Leather Co. v. C. H. Fargo & Co.*, 77 Fed. 671, which seems to have controlled the action of the trial court in rendering a decree in favor of the appellees. In that case it appeared that an insolvent business corporation had executed judgment notes in favor of three of its creditors, and had agreed that it would not execute like notes in favor of any of its other creditors. To make the latter agreement effectual, and for no other purpose, its president and secretary and the majority of its directors resigned, and their places were filled by clerks of the attorneys for the favored creditors who had concocted the scheme. The corporation was thus left bound in the hands of the favored creditors who had been vested with power to make the potential liens actual liens at any moment. It was held, in substance, that judgment notes executed under such circumstances had all the vices of a secret lien. The facts disclosed by the present record, as heretofore detailed, are, in our judgment, materially different from those last recited. The bank held no obligation of the Mercantile Company which it could transform at will into an actual lien upon its property; neither did it have a like power to control the action of the debtor company. The result is that, if we give to the case cited its full weight, we fail to discover, in the facts upon which it was predicated, anything which will serve to alter the conclusions heretofore announced.

One further question affecting the jurisdiction of the trial court is presented by the record which deserves notice. Several of the appellees who intervened in the suit which was commenced by Paris, Allen & Co., and who became co-complainants after that suit was instituted, did not have claims against the Mercantile Company amounting to as much as \$2,000, exclusive of interest and costs, and with respect to

those claims it is contended by the appellant that the circuit court did not have jurisdiction, although said claims had been severally reduced to judgment. The jurisdiction of the trial court over the action brought by Paris, Allen & Co. is conceded, since that firm had obtained a judgment against the Mercantile Company in the sum of \$3,249.42. The question, therefore, is not whether several judgment creditors whose claims are each less than \$2,000 can aggregate them and bring a joint suit for the purpose of maintaining a creditors' bill in the federal court, but the precise question at issue is whether certain judgment creditors whose judgments were each less than \$2,000 had the right to intervene after another creditors' bill had been filed in the federal court over which that court had undoubted jurisdiction. This question, we think, should be answered in the affirmative. The original bill was exhibited for the purpose of reaching a specific fund alleged to be in the hands of the appellant bank, and subjecting the same to the payment of judgments against the Mercantile Company, on the theory that the bank had acquired the fund in fraud of the rights of creditors; and while it is true that the court ultimately rendered a money decree against the bank requiring it to pay specific sums of money to each of the several complainants, yet, in the progress of the case, it might have found it necessary to have appointed a receiver of the fund, or to have required its payment into court for the purpose of distribution. Had the property proceeded against been land or goods and chattels, it would probably have found it necessary to have appointed a receiver. The suit was clearly one to reach a specific fund, and subject it to the payment of debts of the Mercantile Company, and, being a suit of that nature, the court in which such bill was first filed acquired the right to administer the fund without let or hindrance on the part of any other court, according to the principles announced by this court in the cases of *Merritt v. Barge Co.*, 49 U. S. App. 85, 93, 24 C. C. A. 530, and 79 Fed. 228, and *Gates v. Bucki*, 12 U. S. App. 69, 4 C. C. A. 116, and 53 Fed. 961. We think, therefore, that after the original bill had been filed, and the fund proceeded against had thereby been brought within the jurisdiction of the court in such a sense that if it thought proper it could have taken the fund into its own custody, other judgment creditors had the right to intervene for the protection of their interests, even though their judgments were severally less than \$2,000. If they had been compelled to file bills in the courts of the state to reach the same fund and subject it to the payment of their judgments, such a course of procedure might eventually have led to a conflict of jurisdiction. Besides, we do not understand that the provision of the judiciary act limiting the right to sue to cases which exceed \$2,000, exclusive of interest and costs, has any application to cases like the one at bar, where a judgment creditor intervenes and becomes a party to a creditors' bill already filed, which was exhibited by a judgment creditor whose judgment exceeded the jurisdictional amount, and which was filed for his own benefit and for the benefit of others similarly situated who might come in and contribute to the expense of prosecuting the suit. The right of a judgment creditor to file a bill in behalf of himself and other judgment creditors who may elect to join in the proceeding and contribute to the

expense, has been recognized from time immemorial by courts of equity, chiefly because such practice lessens litigation and is also convenient. It is hardly probable, therefore, that the provision of the judiciary act last referred to was intended to change the established practice so as to prevent a judgment creditor from intervening in a proceeding already brought to collect a judgment in excess of \$2,000, excluding interest and costs, if his own claim happened to be less than that sum. The cases chiefly relied upon by the appellant's counsel to sustain a contrary view (*Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. 1066; *Seaver v. Bigelows*, 5 Wall. 208; *Ex parte Baltimore & O. R. Co.*, 106 U. S. 5, 1 Sup. Ct. 35; *Clay v. Field*, 138 U. S. 464, 479, 11 Sup. Ct. 419) are cases where the right of appeal to the supreme court was denied in consequence of the amount involved in the appeal, and, in our judgment, they are not in point on the question at issue. The objection to the jurisdiction of the trial court is accordingly overruled, but, as the decree appealed from was erroneous, the same will be reversed, and the cause will be remanded for further proceedings in accordance with this opinion.

WRIGHT v. PHIPPS et al. ATTRILL v. WRIGHT. DEGRAUW v. ATTRILL. ATTRILL v. DEGRAUW. GATES v. SAME.

(Circuit Court, E. D. New York. October 29, 1898.)

VENDOR AND PURCHASER—MORTGAGE FOR PURCHASE MONEY—FRAUDULENT REPRESENTATIONS—MERGER IN COVENANT—WAIVER—BREACH OF COVENANT—PURCHASE OF OUTSTANDING TITLE—ESTOPPEL—ACTION BY STATE TO RECOVER LAND—LIMITATION.

In 1809, R. purchased lot No. 1, comprising the western end of Rockaway Beach, and in 1814 conveyed the western portion thereof to the state of New York, reserving the right to the drift sedge. The state did not take actual possession, but by its permission the United States built a blockhouse on the point for the purposes of the war of 1812. After the close of the war, the United States ceased its use, and the land remained unoccupied, save as R., of whose remaining premises it was an uninclosed continuation, pastured his cattle upon it, as did others, but it was otherwise useless for agriculture. In 1831 the portion of lot No. 1 not conveyed to the state was sold in foreclosure proceedings. In 1832, R. died, and there was no recognized occupation of the land in question until 1872. The deed of lot No. 1 to R. was forgotten or neglected, and was not recorded until 1879, and R.'s deed to the state was not recorded in the office of the secretary of state until 1835, but its existence was not known to any of the parties to this controversy until 1884, when the state asserted title to the property, and in 1885 brought an action of ejectment therefor. In 1874, in an action of partition, to which the heirs of R., or their successors in interest, were parties, the land was sold to one W., who purchased in the interest of one D., who in 1872 had obtained a lease of the property from the United States. In 1879, W., through D., sold the land to S. for A., for \$200,000, taking back a mortgage for a portion of the purchase price. In 1881 the mortgage was foreclosed, and the premises purchased in the interest of A., who, through several mesne conveyances, received the deed thereof, subject to a mortgage for \$150,000 given for a portion of the purchase money. A., W., and D., in co-operation, defended the action of ejectment brought by the state in 1885, denied the title of the state, and alleged the validity of the title under which A. was holding. Meanwhile, A., W., and D. co-operated to acquire a release of the state's claim, and, as a result of their joint efforts, the state, by an act of the legislature passed in 1887, released its interest to A. for the sum of \$31,044, one-half

of which was paid by A. and one-half by W. In 1890, A.'s interest in the property was sold upon a judgment recovered against him in 1885 by H., and was purchased by P. in the interest of H., and one G. succeeded to the title, and held it in the interest of H. Foreclosures of the mortgage were begun in 1886 and in 1894, and were defended by A., and, after his death, by his heirs, and also by G., and cross bills were filed by such parties to annul the mortgage. The mortgage was alleged to be void (1) upon the ground that W. had and had conveyed no title to A., and A. had purchased the paramount title from the state by virtue of the release; (2) on the ground that at the time of the sale to A., in 1879, the vendor's attorney, one F., had represented fraudulently to the vendee's attorney, who was examining the title, that the land was occupied by R. until his death, and that his house was built on it. It was held by the court: (1) That the alleged representation that R. lived upon the property was not made by W.'s attorney, but that he stated that R. lived upon the portion of lot No. 1 easterly of the land sold to the state, and was in possession of the land in question. (2) That A. was not evicted in fact or constructively by paramount title, but that he received a release of the state's title pursuant to the joint efforts, and at the joint expense, of A. and W., and pursuant to an agreement between A. and W. that the state's interest should be released to A., and that such release was not taken by A. in his sole interest, and against the interest of his grantor, W., for the purpose of extinguishing the title theretofore held by A., but rather to protect the existing interests of the holder of the mortgage, as well as those of the grantee, and to perfect the title already granted to A. (3) That the alleged fraudulent representations as to possession were merged in the covenants of warranty and quiet enjoyment contained in the deed from W. to A.; that in 1880 A. learned that the representations alleged to have been made that R.'s house was on the land in question were not true, and that in 1881 he was privy to the foreclosure of the mortgage given in 1879, and caused the premises to be repurchased in his interest on such foreclosure, and thereupon paid \$20,000 in money and gave the mortgage in question, and that he did not seek to annul the mortgage for the alleged fraud until 1886, when foreclosure thereof was begun. (4) That the judgment creditors of A. acquiring liens in 1885 and 1886, and the purchaser under the sale upon H.'s judgment in 1890, were estopped to assert the fraud by the repurchase by A. after knowledge of facts showing that the misrepresentation, if made, was untrue, and by A.'s delay in seeking relief from the mortgage. (5) That such judgment creditors and purchasers, on the sale of the land on the judgment in 1890, could not assert a breach of the covenants in the deed from W. to A., and were bound by the arrangement made by A. with W. and D. for securing the state's claim in the interest of the existing arrangement. (6) That the right of the state to assert its claim had not been lost by its failure to bring action for recovery of the possession of the property under the statute of limitations prescribed by section 362 of the New York Code of Civil Procedure.

These were suits in equity for the foreclosure of a purchase-money mortgage, which were consolidated, and in which cross bills were filed for the cancellation of such mortgage.

John E. Parsons and Edward S. Clinch, for Alonzo B. Wright and Aaron A. Degrauw.

Hatch & Wickes, for Chittenden, assignee.

Benj. F. Tracy and Maxwell Evarts, for Isaac E. Gates, Henry Y. Attrill, Helen F. Attrill, and others.

THOMAS, District Judge. In 1809, William Cornwell, being seised thereof, conveyed to Nathaniel Ryder a strip of land containing about 200 acres, and comprising at that time the westerly end of Rockaway Beach, the westerly boundary being the inlet or gut. Since that date,

by the action of the water, several hundred acres have been added to the westerly end of the strip. Such deed was not recorded, and seems to have been forgotten, or neglected, until it was found by Judge Morris Fosdick, in his office, and recorded in 1879, under the circumstances hereinafter stated. In 1814, Ryder conveyed to the state of New York the westerly portion of the 200 acres, which, with the additions above mentioned, contain the land in controversy. The deed to the state appears to have been recorded in the office of the secretary of state in 1835, out of its chronological order, but there is no evidence that any of the parties to the present controversy, or any of their agents, had knowledge of such deed or record, until the year 1884, when the state of New York asserted a claim to the land. In 1830 proceedings were taken under the statute to foreclose a mortgage given by Ryder to Cornwell for a portion of the purchase money of the 200 acres conveyed to Ryder by Cornwell, which resulted, on 7th May, 1831, in a sale of such portion thereof as lay east of the land so conveyed to the state, to Rothery Ryder, son of Nathaniel Ryder, and Henry Hewlett. There is no evidence that the state of New York ever took possession of the land conveyed to it, but the United States, by the acquiescence or permission of the state, took control thereof, or a portion thereof, and erected a blockhouse thereon for the purposes of the war of 1812. Such control thereafter ceased, and the blockhouse, falling into disuse, finally disappeared so completely that its precise location is not ascertainable. But the land conveyed to the state was, in a general way, spoken of in that community, and described in surveys, as lands of the government or of the United States. Nathaniel Ryder, although deprived in 1831 of the title to the eastern portion of the land purchased by him, lived in the house thereon, as he had lived theretofore, near to the time of his death, in 1832, which is hereafter considered. In Ryder's deed to the state he reserved the right "at all times to take and carry away, for his own use, the drift sedge" thereon; and he did, intermediate his conveyance to the state and his death, use the land for pasturing his cows and sheep, as such land lay open and undivided by inclosure from his remaining property, and other persons at times used it for grazing purposes. It is doubtful to what extent Nathaniel Ryder claimed an interest in the land conveyed to the state after such conveyance, but there is evidence that he frequently spoke of having sold to the government. After Ryder's death, in 1832, the land in question (the land conveyed to the state) continued until the times hereinafter mentioned, as it had after its disuse by the United States, to lie uninclosed and exposed, a long stretch of sandy waste, useless for agriculture, and unsought for the purpose of residence. There is no parol evidence that Ryder's heirs used it or exercised any rights over it, or claimed to have any interest in it, nor is there any evidence that Ryder's heirs, after his death, continued to live in the house on the eastern portion. But the fact of such possession of the land in question is evidenced (1) by the Durland partition proceedings; (2) by the judgment in *Littlejohn v. Attrill* and others, to which attention is hereafter called.

On the 19th of March, 1872, the secretaries of the treasury and of war of the United States united in a lease to Aaron A. Degrauw,

whereby, in consideration of an annual payment of one dollar per year, Degrauw was permitted to occupy such land until requested by either secretary to relinquish the whole or any part thereof. Somewhat previous to this, Degrauw had erected a hut on the property, and after the lease exercised some dominion over the land. Although Degrauw had obtained a lease from the United States, yet there were no evidences of a record title in the United States, and Degrauw was advised by Mr. Clinch, his counsel, that the title of the land was apparently in the heirs of Nathaniel Ryder, and thereupon one Durland was engaged to obtain releases to himself from such heirs, and the latter did thereafter obtain conveyances from such heirs of ⁵⁸⁷/₈₄₀ of said premises, and thereupon, in 1873, brought an action of partition against such of Ryder's heirs or their successors as appeared to hold the remaining interest. In 1874 it was referred to Edgar A. Hutchins, who was shortly before a law partner of, and at the time had his office with, Mr. Clinch, who was also Durland's attorney, and such referee reported, upon evidence adduced before him, which evidence has not been discovered for the purposes of this action, that "Nathaniel Ryder, Sr., died intestate April 12, 1832, seised and possessed" of the land in question; and "that he had held adverse possession of said real estate, and has claimed to be the owner thereof and exercised rights of ownership therein, from a period preceding the year 1802 to the time of his death, and that at the time of his death he was living on said property." The referee took the evidence of Ruloff Van Clief and wife, Jesse Craft, and Richard Ryder and Smith Ryder, respectively, son and grandson of Nathaniel Ryder, and Judge Morris Fosdick, all of whom were old residents of that section and acquainted with the property. The particular facts stated by these witnesses severally are not shown, but presumptively the referee, from one or all of them, obtained the information embodied in the report. The partition action was conducted with due observance of legal requirements, and all matters known to be of record were laid before the referee.

It is suitable now to consider what facts apparently were known which could be communicated to the referee. In the first place, the conveyance in 1814 by Nathaniel Ryder to the state of New York was unknown to the parties, and the deed to Nathaniel Ryder by Cornwell was not present, and there is no evidence that its existence was within the knowledge of the parties or any of them. Judge Fosdick produced it some years later, on the sale in 1879 from Wright to Smith, and then stated to Mr. Hall, the lawyer examining the title for the proposed purchaser, that "he had found that deed, and that he supposed he had mislaid it or it had been lying about, and he had neglected to record it." Nevertheless, the former ownership of Nathaniel Ryder was known, at least his title was inferable, both from the former occupation of all of lot No. 1 and from the mortgage given to Cornwell for the purchase money. It was undisputed that Nathaniel Ryder lived until 1831 on the eastern part of lot No. 1, and, while it might be presumed that he was deprived of that portion as a result of the foreclosure action in 1831, there was no evidence of record that Ryder had alienated the western portion of lot No. 1 (the land in question), which at one time he had owned and occupied to the degree that such

land was useful for occupation, which land formed an uninterrupted continuation of the portion of lot No. 1. It is apparently an incorrect finding that Ryder lived on the immediate premises up to about the time of his death. His grandson states that he died in his former home; but there is other evidence that in fact he died in the house of his son, who lived on lot No. 2, east of lot No. 1. But, if he died in his former home, that was not on this portion of lot No. 1, if the same be considered independently of the eastern portion. Moreover, it is probably an incorrect conclusion that Ryder held adverse possession of said real estate, and claimed to be the owner thereof, and exercised rights of ownership therein, for a period preceding the year 1802 to the time of his death. Even if this be untrue, in the light of the present knowledge of the history of the property, it is not necessarily an evidence of fraud that testimony of this nature should have been given to the referee, and that he should have found accordingly. The reference to the date of 1802 probably arose from the fact that some of the land involved in the Cornwell partition proceedings (see commissioners' report) was theretofore owned by Ryder, and upon this it is inferable that the claim and finding was based that Nathaniel Ryder's interest in lot No. 1 antedated that action. Whether Ryder had adverse possession was a conclusion for the referee, founded upon the facts presented. For instance, he found that Ryder claimed to own it. As it appeared that he was at one time in possession of all of lot No. 1; that his possession was not interrupted, save as the United States used some portion for a blockhouse; that he executed a mortgage upon it; that he used it for pasture,—it is not a proof of fraud that the referee found that he (Ryder) claimed to own it, and that he held it adversely. The fact must have appeared that Nathaniel Ryder, at some time subsequent to 1809, had occupied and claimed to own the premises in connection with the other part of lot No. 1; and yet it was not clear, by record evidence, where he obtained it, or what he had done with the western portion, and so the doctrine of adverse possession was resorted to for the purpose of sustaining his title. But it does not appear that Judge Fosdick is responsible for any of the conclusions of the referee, and, even if it were otherwise, his statements under oath to the referee are not available to the purchaser from Wright upon a conveyance some years subsequent in time; and the matter is chiefly important as bearing upon certain false statements alleged to have been made by Fosdick at a later period.

It should be observed, in passing, that there was nothing reprehensible either in the motives that prompted the initiation of the partition proceedings or the procedure therein. An examination of the record discloses nice care in collecting whatever was to be learned from the records, and also extrinsic facts, and each step in the action was taken with precision. There was a large tract of land with which Degrauw was acquainted, and which he desired to obtain, and the owner's title was in doubt. He first obtained a lease of it from the United States, in whom, since 1812, both upon surveys and in the estimation of the inhabitants, there were some rights of property. Yet diligent search showed no evidences of property interest in the United States, save as the recollections of the blockhouse and of the occupancy

for the purposes of the war of 1812 manifested the same. The relation of Nathaniel Ryder to the property suggested a probable interest in him, and after his death in his heirs, and Degrauw was quite justified, either in his sole behalf or in his association with Mr. Clinch and others, in obtaining whatever interest existed per chance in the Ryder family. The property was offered for sale in the usual way. In the uncertainty of the title, and perhaps because he was a lessee of the United States, Degrauw preferred to keep distinct whatever rights he had acquired from the United States, and therefore the purchase at the partition sale was made by Alonzo B. Wright, and conveyance was made to him by the referee. It is urged that Degrauw is blameworthy because he is said to have announced at the sale (which he denies) that he had and claimed rights in the land under a lease from the United States. This does not necessarily follow. As the owner of the lease, and in view of the possible interest of the United States, to which he had in a measure succeeded, Degrauw had a right, acting in good faith, to protect whatever of title he held, and the evidence is not convincing that he acted dishonorably. In any case, it was not a wrong that of itself accrued to the injury of any legal right of subsequent purchasers.

Following the history of the property from the time of this sale in the partition action, it appears that Wright continued to hold whatever he acquired in 1874 under the conveyance to him, asserting such right by ejecting by action persons in actual possession, and that Degrauw continued to claim under the lease from the United States acquired in 1872, until the year 1879, when the sale of the property was made out of which the present controversy arose. Although Wright had purchased as above stated, he took no part in negotiating the sale to which attention is now to be called, but the same was conducted on the part of Wright by Degrauw, who held a power of attorney from Wright, pursuant to which he contracted, June 12, 1879, to sell the property to Henry Y. Attrill. Thereby Degrauw recognized the title of Wright in the property. Although Attrill was in fact the purchaser, yet, to avoid certain personal responsibilities, Attrill procured Benjamin E. Smith to take the title, and Smith accordingly accepted the deed of the premises, dated August 15, 1879, from Alonzo B. Wright. This deed contained a covenant of an indefeasible estate of inheritance in fee simple; also a covenant of good right to convey; also a covenant of quiet enjoyment; also a covenant against incumbrances; also a covenant of further assurance; also the usual covenant of warranty. Before the delivery of the deed, it appeared that a lis pendens had been filed against the premises in an action brought by Mr. Clinch against Degrauw, and the purchaser objected to completing the arrangement on that account. To meet this objection, Degrauw executed an instrument under the date of August 15, 1879, reciting the contemplated deed from Wright to Smith, whereby Degrauw guaranteed the fulfillment of the covenants contained in such deed; "provided, however, in case any such claim or liability shall be asserted against said Wright or his heirs or assigns, or against the property so conveyed by him, then prompt and reasonable notice shall be given to me, the said Aaron A. Degrauw, my heirs, executors, or adminis-

trators, of such asserted claim, and I or they be permitted to defend against the same." Pursuant to such deed and contract of guaranty, the premises were delivered to said Smith, and he took possession thereof through himself, or through Attrill, to whom Smith conveyed the premises, with full covenants of warranty, on the 25th day of August, 1879, and the said Attrill thereafter remained in possession of said premises pursuant to said conveyance. The purchase price of the premises, under the contract between Wright and Attrill, and the deed from Wright to Smith, was \$200,000, of which \$30,000 was paid, by or on account of Attrill, to Degrauw or somebody in his behalf, and the remaining sum of \$170,000 was secured by a mortgage on the property executed by Smith to Wright. In 1881, default in the payment of interest having been made on such mortgage, and perhaps for the purpose of eliminating some alleged interest of Smith, a foreclosure was had, pursuant to which the premises were sold to one Billings for \$185,000, who assigned the bid to one Phipps, agent and clerk of Attrill, who on or about July 11, 1881, received a deed from the referee. Phipps executed a bond and mortgage on the property for \$150,000 to Wright, and paid \$20,000 in cash from moneys belonging to Attrill, in whose behalf all the purchases were made, and such moneys ultimately passed to the account of Degrauw. Phipps conveyed the premises to Billings, by deed dated July 11, 1881; Billings, October 3, 1881, conveyed to Moore; Moore conveyed, on 11th September, 1882, to Gerau; and Gerau, on the same date, conveyed to Attrill. The original covenants ran to the purchaser under the mortgage. *Mygatt v. Coe*, 142 N. Y. 78, 89, 36 N. E. 870; *Peters v. Bowman*, 98 U. S. 56, 59; *Thomas v. Bland* (Ky.) 14 S. W. 955. Attrill was meantime in possession, and so continued holding and claiming to hold under no other title than that apparently derived from Wright. In 1881, by chapter 610, the legislature of the state of New York passed an act directed to the investigation and protection of the rights of the state in property acquired during the war of 1812, but no specific reference to the property in question was had. In 1884 a clause was inserted in the supply bill appropriating money to carry out the act of 1881, and pursuant thereto a survey of the Rockaway Point lands was made in February, 1885, at the instance of the state; and in March, 1885, the state brought an action of ejectment against Attrill and Smith, to recover the possession of the lands, notice of the claim of the state having been served on Attrill on January 26, 1885. Attrill first learned of the claim of the state on or about August, 1884. From May 7, 1884, letters were sent by Attrill or his agent, Phipps, to Degrauw, showing co-operation in protecting and promoting the interests of the property in question. In December, 1884, Degrauw and Attrill, both then aware of the claim of the state, met at the office of Mr. Parsons, their attorney, and discussed such claim, and conversation was had to the effect that the claim of the state should be contested, if possible, and, in case it was advisable to settle such claim, that each party should pay one-half the cost thereof; and it was concluded that Mr. Parsons, who was in communication with the state officials, should undertake the arrangement of the matter by the passage of a bill through the legislature; and Mr. Parsons did there-

after, acting for these parties, undertake and continue his efforts to secure a settlement of such claim of the state, until, in 1887, that result was attained. On January 22, 1885, a bill having been drawn, by Mr. Parsons, for presentation to the legislature, Degrauw wrote Attrill that "Mr. Wright will pay one-half of the expenses that has to be paid to the state for the passage of bill, which then will give you a perfect title (if the state claim is a claim), and I will become personally responsible as security for Wright for its payment." Under date of 28th of March, 1885, and while the bill was pending in the legislature, Attrill wrote to Degrauw: "In consequence of the ejectment suit brought by the state of New York against me concerning my Rockaway lands, and your relation to me as guarantor of my title to the property, it is necessary that there should be an immediate understanding between us with reference to the defense of the suit, as I have to make answer in the next few days." Following this is a statement of an intended absence, and then the following: "This is to say that I have authorized Mr. Coles Morris, of 170 Broadway, who is acting for me, in connection with Mr. Jno. E. Parsons, to see you on this subject. I have instructed him fully as to my views in relation to this business." Attrill, Degrauw, Morris, Fosdick, and Parsons continued to have communication and meetings on the subject during the year 1885, although the bill was, during the session of 1885, defeated in the legislature. After the opening of the year 1886, such communications continued, and the aid of Degrauw was sought and obtained by Morris to defeat actions brought by Hatch and Huntington, about claims of certain personal liability against Attrill, concerning the sale of the premises on judgments recovered therein, concerning the trial of the action of the state, and the suggested foreclosure of the mortgage given by Attrill to Wright, and the purchase of the premises on the sale thereof by Degrauw in the interest of Attrill. Thus the matter was brought down to the year 1887.

Before considering the events of that year, leading up to a release of the rights of the state to Attrill, a reference to the litigation that had arisen is necessary. Under the date of January 13, 1885, Attrill sent to Fosdick, Degrauw's attorney, the following letter:

"If the title is good, it is all right. If the title is bad, I do not suppose that I am liable for the mortgage, either principal or interest. I send a check, but perhaps it is better for me in doing so to say that it is not to be considered as a waiver of any of my rights. Between now and the time that interest becomes due, I hope that the title question will be settled. With the state claim against the property, I cannot use it. If within the six months all questions are not disposed of, I shall then wish, instead of paying the interest, either to let it stand or make it a special deposit."

Before the next payment of interest became due, and on the 19th day of February, 1885, the state had begun the action of ejectment, and under the date of 6th June, 1885, Attrill wrote Fosdick the following letter:

"I went to Jamaica to see you and Mr. Degrauw relative to the Rockaway land matter, and regretted not to find you in town. My business was relative to the coming interest on the mortgage. I desire to have the payment postponed at its due date, or held over until the state ejectment suit is decided one way or the other; for, if the suit is decided against me, the mortgage is worth nothing, and I should have recourse against Mr. Degrauw. I trust you will

come into my views as to the necessity for withholding of the interest on my part, even in the face of the terms of the mortgage."

—To which Fosdick answered as follows:

"Yours of the 6th inst. rec'd, and contents noted. I have had consultation with the holder of the mortgage. He is not willing to make the arrangement you suggest, on the ground that it might be construed as implying a doubt on his part of the goodness of his mortgage, and he did not intend, if he could avoid it, of being placed in such a position."

But Attrill did in the August following make the payment falling due July 11, 1885, which was the last payment made upon the mortgage. On 21st December, 1885, Hatch and Fisk obtained a judgment against Attrill for \$163,690.31, and on June 13, 1886, Huntington obtained a judgment against Attrill, and both judgments became liens on the premises. On the 25th day of April, 1890, the premises were sold on execution issued on the Hatch judgment, and on the 30th day of July, 1891, one Parkin became the owner of whatever interest was acquired on such sale by virtue of the sheriff's deed, and this interest was subsequently granted to Gates. On August 2, 1886, Wright began in the supreme court of New York the foreclosure of the mortgage given him by Smith for a portion of the purchase money, and Attrill, by answer verified on November 13, 1886, answered in such action, as did Hatch and Fisk, which action was removed to this court on the 19th of November, 1886. On the 25th of January, 1887, Attrill filed a cross bill, amended December 5, 1887, to which Wright answered. Evidence was taken on the cross bill filed by Attrill, from February 16, 1888, to December 4, 1891, and by the defendants in the cross bill from October 10, 1888, to June 19, 1890. On the 20th of January, 1892, Attrill died, and a bill of revivor was filed by William A. Fisher, the assignee of Attrill's administrator, on the 31st of May, 1892. In July, 1894, Aaron A. Degrauw commenced a suit for the foreclosure of the same mortgage, against Helen F. Attrill, Elizabeth C. Attrill, Horace H. Chittenden, as assignee, C. P. Huntington, and Isaac E. Gates, setting up an assignment of the bond and mortgage made by Alonzo B. Wright to the plaintiff Aaron A. Degrauw, dated June 13, 1894. Helen F. Attrill and Elizabeth C. Attrill answered, and on October 9, 1894, they filed a cross bill setting up fraud, no title in Wright, and purchase by Henry Y. Attrill of title of state. The defendant Gates served his answer, and simultaneously, on the 9th of August, 1894, removed the cause into the United States circuit court for the Eastern district of New York. Thereupon Gates filed a plea in this last action, setting up a former action pending between the same parties. Testimony was taken upon such plea, and the issues raised by the plea and replication thereto were brought to a hearing before Judge Wheeler, who on the 29th of June, 1896, overruled the plea and directed the defendant Gates to answer. Thereupon, on the 2d of October, 1896, the defendant Gates answered, and simultaneously with said answer filed a cross bill to the original complaint, alleging fraud in the manufacture of a paper title, which was transferred to Attrill, and setting up want of title in Alonzo B. Wright and the conveyance by the state to Attrill. Degrauw filed an answer to the cross bill. On the 26th of February, 1897, an order was made consolidating all these actions: Wright v. Attrill, Degrauw v. Attrill,

Fisher v. Wright, Attrill v. Degrauw, Gates v. Degrauw; and directing that they be heard as one. In September, 1897, a small amount of testimony was taken,—that of the witness Edward S. Clinch.

The answer of Attrill in the Wright foreclosure action averred, among other things, that:

"Attrill held under the contract with Wright; that Wright never had any interest in, or right to, or possession of, the said mortgaged premises, his alleged title thereto being nothing but a paper title, which was a false and fictitious fabrication, conceived and gotten up for the sole purpose of enabling the plaintiff to perpetrate a fraud upon purchasers of said premises from him; and that the defendant was so defrauded, and purchased said premises from the plaintiff, relying upon the validity of such paper title, which was expressly alleged by or on behalf of the plaintiff to be a truthful statement of the plaintiff's title to said premises, and upon representations made by or on behalf of the plaintiff to said defendant, or to his attorney, who was employed by said defendant to examine said title, that one Nathaniel Ryder, through whom and his heirs the plaintiff claimed title to said premises, had held adverse possession of the same, and exercised rights of ownership therein, from the year 1802 to the time of his death, in 1832, and was living thereon at the time of his death; which allegations and representations, as said defendant has since been informed and believes, were false, and were known to the plaintiff to be false when they were made."

The answer of Hatch and the answer of Huntington each avers that the defendant's interest in and lien upon said premises, by reason of the judgment above described, is not in any wise subject or subordinate to any lien of the alleged mortgage referred to in the complaint, and that, if any such mortgage was ever executed, the same did not represent any actual indebtedness, or obligation of any security for any actual indebtedness or obligation, and was given without consideration, and was wholly void.

Notwithstanding the allegations in the several answers and bills filed by Attrill, he appeared in the action of ejectment brought by the state, and denied that the plaintiffs "are, or that at any of the times in that behalf in the complaint alleged they were, owners in fee simple, absolute or otherwise, or entitled to the immediate possession, or to the possession at all, of the said described lands, or of any part thereof"; and denied that the said lands "are, or that at any of the said dates they were, or that for a long time prior thereto or at all they had been, unoccupied"; but rather Attrill alleged "that at the dates in the complaint stated, at the time of the commencement of this action, and for more than forty years prior thereto, he, and those through whom his title is derived, all of whose rights in the premises have become duly transferred and conveyed to him, are and were the true and only owners of the said lands, and seised of the same by a good title in fee simple absolute, and that at all such times he and they were in the possession and occupation of the said premises, exercising acts of ownership over the same, and claiming title thereto, and to be the sole, only, and absolute owners thereof, by a title in fee adverse to any claim of ownership in the plaintiffs."

In no action have any of the parties now claiming the premises in hostility to Wright or Degrauw alleged either eviction, actual or constructive, or surrender to a paramount title. In all pleadings by Attrill during his life he alleged that he was holding under the contract of

sale made by Wright and himself, subject to the mortgage given to Wright, or under the conveyance by Phipps to himself. He also alleges that Wright had no title, and that the sale was procured by means of fraudulent representations; but no superior title is ascribed to the state, or to any specified person, nor is there any allegation of fraud showing eviction, actual or constructive. There was therefore no occasion for Wright to answer with averment that the state's interest was procured pursuant to an agreement between Attrill, Wright, and Degrauw to extinguish the same. In no instance have Hatch, Huntington, Gates, or the administrator or widow or heirs of Attrill alleged either eviction, ouster, or surrender to a paramount title, but Gates and Helen F. Attrill, the widow, and Elizabeth C. Attrill, the daughter, of Attrill, have alleged that Attrill, in his lifetime, procured the title of the state, and held under the same to the time of his death; to which answer was made that the title of the state was relinquished to Attrill by the joint action, and at the suit and expense, of Wright, Attrill, and Degrauw.

But how did Attrill obtain the state's title? After the opening of the year 1887, Mr. Degrauw, Mr. Clinch, his attorney, and Mr. Morris, the attorney for Mr. Attrill, acting in conjunction with Mr. Parsons, again undertook the settlement of the claim of the state, and held communication, by letter and in person, relating thereto. An act was prepared and considered by all these persons, and introduced into the legislature. Before its passage the following stipulation was made and delivered to Mr. Morris, at his solicitation:

"Supreme Court, Queens County.

"The People of the State of New York against Henry F. Attrill and Eugene Smith.

"Whereas, a bill has been introduced into the legislature of the state of New York, which is intended to release to Henry Y. Attrill and his assigns all the interest the state may have in the premises described in the complaint in this action, on which lands I hold a mortgage: Now, therefore, I agree to pay one-half of the amount that it may be necessary to pay to secure such release, by the terms of the act that may be passed by said legislature, provided the total amount to be paid shall not exceed the sum of twenty-five thousand dollars.

"Dated March 12, 1887.

Alonzo B. Wright.

"In consideration of the sum of one dollar, I hereby guaranty the performance by Alonzo B. Wright of the preceding agreement.

"Dated March 12, 1887.

Aaron A. Degrauw."

As the result of the efforts and acts of such persons, chapter 560 of the Laws of 1887 was passed, releasing the land in question to Attrill, upon the payment by him, within 60 days after the passage of this act, to the comptroller of the state, of the sum of \$20,000. This sum of money, together with \$11,044, making \$31,044 in all, was paid, one-half by Attrill and one-half by Degrauw. The payment by Degrauw was pursuant to the stipulation hereinbefore set forth. Although Attrill denies knowledge of the written stipulation by which Wright and Degrauw bound themselves to the payment of the sum aforesaid, yet it fully appears that Attrill authorized the arrangement, and, indeed, it appears that he had made a similar arrangement in person. Beyond controversy, Attrill knew of Degrauw's co-operation in procuring the release, and of his agreement to contribute to obtaining the same.

It thus appears that Attrill secured the state's claim by buying it at a small price, in part with Wright's or Degrauw's money, after some years' disclaimer of such title by himself and Degrauw, and pursuant to negotiations between Degrauw and himself to so purchase it, culminating in a stipulation to that effect drawn by his authorized agent in the ejectment action. The object of all this was not to vest in Attrill a paramount title that should extinguish Wright's mortgage, but to acquire the state's claim in the interest of Degrauw, Wright, and Wright's grantee, Attrill, the person to whom Wright and Degrauw had assured the title. The intention of the parties, and the object they had in view, is indubitably revealed by their intercourse, their correspondence, their conversation, their agreements, and their payments. With these facts in view, the question of eviction may be considered.

Covenants of seisin and of good right to convey do not run with the land, and are broken, if at all, by the delivery of the deed,—in the present case by such delivery to Smith. *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. 611; *Marston v. Hobbs*, 2 Mass. 439; *Greenby v. Wilcocks*, 2 Johns. 1; *Hamilton v. Wilson*, 4 Johns. 72; *Abbott v. Allen*, 14 Johns. 248; *Peters v. Bowman*, 98 U. S. 56; *Leroy v. Beard*, 8 How. 451; *Pollard v. Dwight*, 4 Cranch, 421. The cause of action arising upon such breach passes only by assignment to a subsequent grantee (*Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. 611; 3 Washb. Real Prop. 479); but covenants of warranty and of quiet enjoyment, which are to be regarded as synonymous (3 Washb. Real Prop. 499; *Rea v. Minkler*, 5 Lans. 196, 199), are future in their operation (3 Washb. Real Prop. 498), and the action for the breach should be brought by him who is the owner of the land, and, as such, the assignee of the covenant at the time it is broken (3 Washb. Real Prop. 503). If the covenant was broken before sale to a subsequent grantee, it may be sued on by such subsequent grantee in the name of the holder. *Peters v. Bowman*, 98 U. S. 56, 59. Even a release from the covenant itself can be made, and only made, by the one who holds the title of the estate, and such discharge affects only such subsequent bona fide purchasers as have notice of the same when purchasing the estate. 3 Washb. Real Prop. 505. In the present case, although the Hatch and Huntington judgments became liens on the property severally in 1885 and 1886, the estate did not pass out of Attrill on a sale thereunder previous to 1890, and prior to that time Attrill, and Attrill alone, had power to enforce or to discharge any breach of the covenants of warranty and of quiet enjoyment. There were several courses open to Attrill upon the assertion of the claim of the state to the land. He could defend, with or without notice to his grantor to protect his covenant. He could surrender the premises, or await an eviction. If he defended without notice to his grantor, or surrendered the premises, or awaited eviction without notice to his grantor, he assumed the burden of showing that the outstanding title was paramount. *McGrew v. Harmon*, 164 Pa. St. 115, 30 Atl. 265, 268; *Ogden v. Ball*, 40 Minn. 94, 41 N. W. 453; *Hodges v. Latham*, 98 N. C. 239, 3 S. E. 495; *Succession of Cassidy*, 40 La. Ann. 827, 5 South. 292; *Shattuck v. Lamb*, 65 N. Y. 500. In the present action there is not even a pretense of eviction. In all the pleadings filed by

Attrill there is no assertion of eviction, constructive or actual, by one holding paramount title, or of surrender of premises in view of such paramount title. But, on the other hand, from the very moment that the state asserted title to the premises, Attrill defied, and used every effort that the machinery of the law would permit to defeat, the title of the state, and consistently therewith denied in his answer such title, and asserted good and valid title in himself and in his grantor. Moreover, although he did in the action of foreclosure aver the fraud as a defense, and deny the title of Wright and Degrauw, yet inconsistently therewith he undertook, in co-operation with Degrauw, to defeat the title of the state, and, through himself and his agent and attorney, entered into a stipulation that Degrauw and Wright should furnish one-half of the money to obtain the release of the state's claim. By letter, by personal interview, by conjoined endeavor in defending the state's action, in appealing to the legislature, and in effecting the passage of the bill through the legislature, Attrill showed his willingness and agreement to work in conjunction with Degrauw to acquire the claim of the state and to permit existing relations to remain undisturbed. It is very well known that the state, in releasing claims, prefers those who have the apparent title, and the release was made to Attrill in this case because he was holding possession under the title alleged to be conveyed to him by Wright, and because he asserted to the state that he was in possession, holding such title and claiming it to be valid. The very right, and the only right, that he had in the property, and the only claim he had upon the state to relinquish its interest to him, for the small sum paid, was this pretended equity, which he founded upon the very title which, having obtained the release, he now seeks to dispute. Therefore the insistence by Attrill's heirs and successors that this release constituted an independent purchase of the title, in hostility to the existing deed given by Wright, cannot be supported. It is true that, in addition to the courses above stated to be open to Attrill, another course has been considered available to the grantee, viz. to purchase the paramount title when it is so asserted that he must submit to it or to ouster. The decisions relating to this alternative involve two distinct classes of facts: Those where the grantee was in possession and judicial sale was made of the land, at which the grantee, or some one in his behalf, purchased to save his possession. Such were *Cowdrey v. Coit*, 44 N. Y. 382; *Tucker v. Cooney*, 34 Hun, 227; and see *Hunt v. Amidon*, 4 Hill, 345; and such may be accepted as the law, notwithstanding the holding in *Waldron v. McCarty*, 3 Johns. 471. But in the case at bar the claim is that Attrill, by a similar compulsion, and constrained so to do by the action of ejectment brought by the state, purchased the state's title. In New York this has never been held tantamount to eviction, and there is decision tending to a contrary conclusion. *Boreel v. Lawton*, 90 N. Y. 293, 297; *Edgerton v. Page*, 20 N. Y. 281; *Mead v. Stackpole*, 40 Hun, 473, 476. But in other states there is decision favoring the right of the grantee to purchase at private sale and hold under paramount title. Perhaps the view is most forcibly presented in *McGary v. Hastings*, 39 Cal. 360, 366; and support for the doctrine may be found in other cases, which need not be reviewed at this time.

If the doctrine stated be supported by them, still the rule must be that the purchase must appear to have been made in the interest of the grantee, and against the interest of the grantor, for the purpose of extinguishing the title theretofore held by the grantee, and for the purpose of asserting the new title thus acquired against the previous grantor. If, on the other hand, it appear that grantee and grantor have defended against the claim of a third person to the land; that they have, through several years, co-operated to settle it; that they have agreed to share in the expense thereof, and do so share; and pursuant thereto a release of the outstanding title is made to the grantee upon the payment by the grantee and grantor of a sum which bears a slight relation to the value of the land,—it must be concluded that the release was obtained and taken by amicable arrangement, for the purpose of protecting the existing interests of the grantor as well as those of the grantee. It has been held that a grantee must act in good faith towards his covenantor, and make the most of whatever title has been acquired until resistance to the paramount title ceases to be a duty to himself or his covenantor. *Moore v. Vail*, 17 Ill. 190. See *Hagler v. Simpson*, 44 N. C. 386. However this may be, it is a defensible doctrine that when the grantor and grantee unite for a certain end, viz. the settlement of an outstanding claim, and devote several years of joint action to this common purpose, a court of equity should not permit the grantee thereupon to declare that because, under the arrangement, the release was made to him, he was thereby entitled to recover the original purchase price from the covenantor. In the case at bar, the mortgage represents simply a portion of the purchase price, and Attrill would have no greater right to relief against the mortgage than he would have to recover the amount thereof if it had been previously paid. It is a general rule that the grantee cannot resist payment of mortgage upon land purchased by him upon the ground of invalidity of title in the grantor, and at the same time retain possession. *Gifford v. Society*, 104 N. Y. 139, 10 N. E. 39. Attrill not only retained the possession, but he did so in vigorous protest against the asserted paramount title, and he confirmed that possession by the aid of the holder of the mortgage, whose interest he now seeks to defeat.

With these facts stated, it becomes necessary to consider the question of fraud, and therefore to go back to the time when the examination of the title was made by Hall, an attorney for Attrill. At the time the contract between Degrauw and Attrill was perfected, and after the terms thereof had been determined, Hall, a lawyer, was called in by Attrill, and made an examination of the title. Mr. Morris Fosdick, who was an agent or attorney for Degrauw, was present, and offered to give Hall information concerning the property, and, according to the evidence of Hall, produced a deed from Cornwell to Nathaniel Ryder, as above mentioned, and also stated that there was a blockhouse on the point west of the United States line, and that Mr. Nathaniel Ryder, at that time dead, had, during his lifetime, resided, generally speaking, on the furthest part of the inlet or point then occupied by any one as a residence,—furthest point down towards the end of the property where anybody lived; “and I think he told me it was on a point beyond the blockhouse,—west of the blockhouse; I should say

some little distance down. I got the idea from him, and I got the information from him." And the witness, refreshing his memory from an abstract of title made at the time, said: "I see that I have stated in the abstract of title that I made of this property that five thousand feet, or about five thousand feet, running west of the United States line, was occupied by Nathaniel Ryder until his death, his dwelling house being built on it. That information I have no doubt I believed to be correct at the time I obtained it from Mr. Fosdick." Fosdick, upon his examination herein, stated that he knew where Nathaniel Ryder's house was, and had frequently seen it, and that it was situated about one mile to the east of what was called the "United States Line"; that he did not state to Mr. Hall that the house was west of the blockhouse. It is urged that Fosdick probably made the statement as claimed by Hall, because Fosdick made an affidavit in the Littlejohn suit in which he stated as follows:

"And since I can remember the said property [referring to the land lately conveyed by Alonzo B. Wright to Benjamin E. Smith, and by Smith to Henry Y. Attrill] was occupied by the said Nathaniel Ryder, Sr., and in his possession, until his death, in 1832, and his children and their descendants continued to occupy and possess the said premises, or that part thereof west of the United States line, until about the year 1872."

The general sum of the charges against Fosdick is that he stated to Hall that Ryder's house was about one mile west of the United States line, and that Ryder had possession of the property in question. It seems quite improbable that Fosdick located Ryder's house as stated by Hall. Such a location would have apparently placed it in the sea, and an invention so clumsily fabricated was open to swift detection by aid of common knowledge of the living contemporaries of Ryder. Hall undoubtedly intended to state the conversation correctly, but his evidence is not sufficiently superior in quality to that of Fosdick, himself a person much trusted, to make it acceptable as proof of a fraudulent statement. Fosdick probably stated that Ryder's house was the last house on the point, and it is equally probable that Hall mistook the given direction from the United States line. But it is urged that Fosdick stated that Ryder had occupation of the property in question until the time of his death. If so, consider the circumstances under which such a statement was given. Hall was a skilled lawyer, employed to trade the title of this property. Fosdick was called in, and his knowledge of the property was placed at the disposal of Hall, to aid him in his search. Fosdick produced and delivered to Hall the deed from Cornwall to Ryder, and that deed showed that Ryder apparently had the title and presumptive possession of the property from 1809. Add to this the facts that the deed covered all of lot No. 1; that Ryder's house was on lot No. 1; that lot No. 1 was an undivided and uninterrupted stretch of sand, washed by water on three sides; that no alienation of the land in question was known; that Ryder pastured it, and used it as much as it was capable of use; that there was apparently no difference in the use of the land at any time from 1809 to Ryder's death,—should Fosdick be condemned for stating that Ryder had possession of the land in question during his lifetime? Would any person knowing these facts have come to a different conclusion? There is some

discrepancy as to whether Ryder died in his old home, and on the evidence now given the matter is in doubt, but it is not in doubt that Ryder did live on lot No. 1 to about the time of his death. Hall was quite aware that he was asking about events happening nearly 50 years before. He knew that he was seeking the history of spaces of drifting sand, and, down to a late period, of all but valueless land. He knew that the possession thereof would not be evidenced by artificial inclosures or actual cultivation, and that whether Ryder possessed it could only be concluded from his legal title to lot No. 1, subsequent grants of the same, and of evidences of such use as the land would permit. When, therefore, Fosdick stated that Ryder was in possession of the land, Hall must have understood that such was a conclusion or inference from all known facts. Possession under a claim of ownership could be only an inference, and in the opinion of the court, under the facts then known, was a perfectly justifiable, if not the only reasonable, inference. And it was by means of just such proof that Attrill obtained the judgment in the Littlejohn suit, to which attention will soon be called. This judgment, and Attrill's subsequent acts, as will be shown, convincingly dispose of the entire question of fraud.

It may be considered whether the representations were merged in the covenants. In *Andrus v. Refining Co.*, 130 U. S. 643, 647, 9 Sup. Ct. 646, it is said:

"The covenant in the deed for quiet possession merged all previous representations as to the possession, and limited the liability growing out of them. Those representations were to a great extent, if not entirely, mere expressions of confidence in the company's title, and the right of possession which followed it against all intruders. The covenant was an affirmation of those statements in a form admitting of no misunderstanding. It was the ultimate assurance given upon which the plaintiff could rely,—a guaranty against disturbance by a superior title. That covenant has not been broken. * * * False and fraudulent representations upon the sale of real property may undoubtedly be ground for an action for damages, when the representations relate to some matter collateral to the title of the property and the right of possession which follows its acquisition, such as the location, quantity, quality, and the condition of the land, the privileges connected with it, or the rents and profits derived therefrom. *Lysney v. Selby*, 2 Ld. Raym. 1118; *Dobell v. Stevens*, 3 Barn. & C. 623; *Monell v. Colden*, 13 Johns. 395; *Sandford v. Handy*, 23 Wend. 260; *Van Epps v. Harrison*, 5 Hill, 63. Such representations by the vendor, as to his having title to the premises sold, may also be the ground of action where he is not in possession, and has neither color nor claim of title under any instrument purporting to convey the premises, or any judgment establishing his right to them. Thus, in *Wardell v. Fosdick*, 13 Johns. 325, an action for deceit was sustained against the vendor of land which had no actual existence, the court holding that in such case the purchaser might treat the deed as a nullity. The land not being in existence, there could be no possession, and, of course, no eviction, and consequently no remedy upon the covenants, and the purchaser would be remediless if he could not maintain the action. But where the vendor, holding in good faith under an instrument purporting to transfer the premises to him, or under a judicial determination of a claim to them in his favor, executes a conveyance to the purchaser, with a warranty of title and covenant for peaceable possession, his previous representations as to the validity of his title, or the right of possession which it gives, are regarded, however highly colored, as mere expressions of confidence in his title, and are merged in the warranty and covenant, which determine the extent of his liability."

This decision accords with the suggestion of Judge Marcy in *Leonard v. Pitney*, 5 Wend. 30, and with the dissenting opinion of Judge Bron-

son in *Whitney v. Allaire*, 1 N. Y. 313, but does not accord with the prevailing opinion in that case, which followed *Culver v. Avery*, 7 Wend. 380, and *Ward v. Wiman*, 17 Wend. 193, which are distinguishable from *Monell v. Colden*, 13 Johns. 396, 403. There are doubtless decisions in other states that uphold the holding of the rule as finally stated by the court of appeals of New York. *Cooley, Torts* (2d Ed.) p. 577. But whatever the holding elsewhere, or on different states of fact, the rule asserted in *Andrus v. Refining Co.*, *supra*, is easily applicable to any untrue statements that may be found to have been made by Fosdick to Hall.

But the claim is that not only these representations were made, viz. (1) possession of Nathaniel Ryder and his heirs, (2) the location of Ryder's house west of the United States line, but that Attrill relied upon them, and the court is apparently asked to consider that Attrill for the first time learned that they were false upon assertion of its title by the state. In the suit instituted by Littlejohn, Attrill, Smith, Degrauw, Wright, and others were defendants. That suit involved the title of this very land, and the defendants obtained a judgment, which, among other things, provided:

"(4) From the time of the conveyance to the said Henry Y. Attrill he has claimed to own, and has been in possession of, the said premises, and he, and those through whom his title is derived, have at all times claimed to own, and be in possession of, the said premises, and they have had such possession thereof as the nature of the case admitted, the same consisting of unimproved land and upland beach, not cultivated or inclosed."

Then there is a finding of the actions of ejectment brought by Wright against William H. Newberry and Samuel Carman, and then follows: "They are the only persons who lived upon the premises prior to the conveyance to the defendant Attrill." This judgment was rendered October 1, 1880, at the instance of Attrill, upon proof presumptively supplied by Attrill and accepted by Attrill. In it he established a previous possession of those to whom he stood in privity of estate, including Nathaniel Ryder and his heirs, and in that he showed to the satisfaction of the court that no person before his purchase ever lived upon the premises. After such proof and judgment, he procured or was privy to the sale of the property by foreclosure, directed the purchase thereof by his agents, and the execution of the mortgage in question, paid or caused to be paid to Wright the sum of \$20,000, and finally took title to himself. He then waited until the foreclosure of that mortgage was begun, and for the first time set up the alleged fraudulent representations as to possession by the Ryders, and as to Ryder's residence, which possession he had established, and which residence he had disproved, by the very judgment secured by him at least six years previous. On such a state of facts, those succeeding to Attrill's interest ask the court to decree that the contracts of conveyance and the mortgage be rescinded for fraud.

What is the rule of law applicable to the rescission of contracts induced by fraud? If a person elect to rescind a contract for such cause, he must do so promptly, upon the discovery of the fraud, and, if he continue the use and occupation of the property received under the contract, he will be deemed to have elected to affirm it. *Upton v. Tribil-*

cock, 91 U. S. 45, 54; *Schiffer v. Dietz*, 83 N. Y. 300; *Strong v. Strong*, 102 N. Y. 73, 5 N. E. 799; *Pryor v. Foster*, 130 N. Y. 171, 29 N. E. 123. What did Attrill do? If any fraudulent and false representation was made, he learned thereof in 1880; he retained possession thereafter; suffered or contrived a sale on foreclosure; repurchased; paid a large sum of money on such purchase, and arranged that the purchase-money mortgage should be given; co-operated with the alleged wrongdoer to defeat the state's claim, and in conjunction with him settled the same; he answered in the foreclosure suit, and alleged in the cross bill that he held under the alleged fraudulent contract, or under the conveyance given pursuant thereto; he made no offer before suit, or in any pleading in suit, to surrender the possession which he had received under the contract, and consequent conveyance, but did not ask that the purchase-money mortgage be canceled, to the end that he be left in undisturbed possession of land. That is, he sought to continue the possession which he had acquired under the contract, and vacate the obligation to pay therefor. If Attrill ever had a right to rescind the contract, he waived it by his acts and conduct.

But it is argued that Attrill's waiver of the fraud did not and could not affect Gates, and cases involving usurious mortgages are invoked. These decisions hold that the usurious mortgage by acts of the mortgagor may become valid in the hands of a subsequent bona fide purchaser thereof, but not so as to take precedence of judgment liens attaching intermediate the inception and purchase of the mortgage. Usurious contracts are void, and cannot be validated by the mortgagor, save by an estoppel in pais operating in favor of a bona fide purchaser of the mortgage. But, even if such rule were applicable, Attrill had lost the right to ask a court of equity to rescind the conveyance, and the mortgage given thereunder, before the liens of the judgment attached, and much the more before the title was obtained from the state, or before the date of Parkin's purchase. A judgment creditor, securing a lien at least five years after the judgment debtor knew of the alleged fraud, and four years after he took title again from the same grantor on foreclosure of his first purchase-money mortgage, stands in no such privity to the estate that he can rescind the fraudulent contract, especially when his debtor had lost the right before his lien accrued. Such creditor would thereby be accredited with rights that his judgment debtor did not have, and would have power of rescinding the contract in a court of equity, after the debtor had lost such right by his laches and confirmation of the contract. If an owner of property is induced by fraudulent representations to convey the same, it may be that an assignee of his property for the benefit of creditors would have the right to avoid the conveyance. Such was the case of *McMahon v. Allen*, 35 N. Y. 403. In such case the cause of action passes to the assignee. But if a person by fraudulent representations be induced to purchase property, and give back a mortgage for the purchase money, the vendee's judgment creditors cannot maintain that the cause of action for the fraud runs to them, and that they may assert the fraud and annul the mortgage, but keep the land, and that the vendor cannot discharge his claim therefor. If the debtor is unwilling or neglects, until his remedy has been lost, to disturb the transaction, subsequent creditors cannot

do so, and the cause of action in equity is extinguished. *Graham v. Railroad Co.*, 102 U. S. 148.

A discussion of the statute embodied in section 362 of the Code of Procedure of New York is not necessary, in view of the conclusions already reached. However, it seems to this court that such statute was not available as a defense to the action of ejectment brought by the state. The Code (section 362) provides that the people will not sue for lands, or the profits thereof, by reason of right or title in them, "unless (1) the cause of action accrued within forty years before the action is commenced; or (2) the people, or those from whom they claim, have received the rents and profits of the real property, or of some part thereof, within the same period of time."

The Revised Statutes (2 Rev. St. p. 292, § 1) were essentially the same, save that the period of time was 20 years, and the words "such right or title," instead of the words "the cause of action," were used. The rule, as embodied in 1 Rev. Laws, 1813, p. 184, § 1, had this added provision: "And in every case where such title should not have accrued within the time aforesaid, unless such rents and profits shall have been received as aforesaid, the person * * * holding such lands * * * shall freely hold and enjoy the same against the said people, and also against all persons claiming by or under them. * * *" In *Wendell v. Jackson*, 8 Wend. 183, and *People v. Denison*, 17 Wend. 312, it was determined that proof that the premises were vacant and unoccupied, within the period necessary to be shown to establish an adverse possession against the people, is prima facie sufficient to entitle the people to recover. See, also, *La Frombois v. Jackson*, 8 Cow. 589. It was decided in *People v. Van Rensselaer*, 8 Barb. 189, and *People v. Livingston*, Id. 253, that, in order to bar an action of ejectment in favor of the people, the defendant, or those under whom he claims, must show title or continuous possession of the premises for 40 years. *People v. Arnold*, 4 N. Y. 508, like the cases already cited, was decided under the Revised Laws (page 184, § 1), and it was held that a title in the people, accruing more than 40 years before suit brought, was not defeated, unless the land had been held for that period in hostility to the title, and that the people must be deemed to have received the rents and profits of wild and uncultivated lands, which were not in the actual possession or enjoyment of some one, as the title would draw to it the constructive possession. This case is cited as apparently authoritative in *People v. Van Rensselaer*, 9 N. Y. 291, 329, 343, and also in *People v. Rector*, etc., of Trinity Church, 22 N. Y. 44. However, in the latter case, it was held that "there is no presumption of title in favor of the people against the actual occupant of land until it is shown that the possession has been vacant within 40 years." "On the contrary," it is said, "the only presumption which can be admitted is that during all the period which is a blank, according to the evidence, the condition and occupancy of the property were the same as they are proved to have been at the commencement and the close of the period." In *Railroad Co. v. Slaughter*, 49 Hun, 35, 1 N. Y. Supp. 554, it is stated in the opinion that "the possession of a defendant, to render the statute effectual to bar a recovery, must be hostile; otherwise the people will be deemed to have received the rents and profits." It is also stated that the burden is on

the people to show a title accruing within 40 years, and also that the land had been vacant within the prescribed period, or that within that time they have received the rents and profits.

None of these cases were decided under the present section 362 of the Code. By its provisions it must appear that the cause of action arose within 40 years, rather than that the title accrued within the stated period. What is meant by "cause of action"? Obviously that at some time previous to the action the people acquired the title, and that some person is wrongfully withholding the possession from the people, and that such wrongful withholding has not continued on the part of the present occupant or his predecessors to whom he stands in privity of estate for the period of 40 years before the action was begun. The New York Code of Civil Procedure (sections 370, 371) states what shall constitute adverse possession. The land in question has not been "usually cultivated or improved," nor "protected by a substantial inclosure," nor "used for the supply of fuel or fencing timber, either for the purposes of husbandry or for the ordinary use of the occupant"; nor has there been, so far as the evidence in this action shows, an actual occupation under a claim of title during the full period of 40 years preceding the action by the state. It may be that various persons have claimed the ownership and asserted rights of possession, but there has been no exclusive assertion of such claim by persons who stand to each other in the relation of privity of estate. By using the words "cause of action," it is the evident purpose to protect unoccupied lands of the state, of which it may have acquired title at a period more than 40 years previous to the time of action, and indulging the presumption that such title carries possession, unless it appear that there has been a possession inconsistent with the state's ownership, which has continued for the space of 40 years.

It follows from the views herein expressed that the complainants in the foreclosure action should have the usual decree of foreclosure, with costs against the defendants contesting such action, and that the cross bills should be dismissed, with costs to the defendants contesting the same.

ROLLINS et al. v. BOARD OF COM'RS OF RIO GRANDE COUNTY.

(Circuit Court of Appeals, Eighth Circuit. November 7, 1898.)

No. 1,029.

1. MUNICIPAL CORPORATIONS—ACTION ON COUNTY WARRANTS—BURDEN OF PROOF.

In an action on county warrants, where the only defense is that the county had exceeded the constitutional limit of indebtedness, the introduction of the warrants, properly executed, and proof of their ownership by the plaintiff, make a *prima facie* case, and place on the defendant county the burden of proving by competent evidence the facts necessary to show that, when the indebtedness represented by the warrants was created, the county was incapacitated by the limitation from incurring the same.

2. SAME—CONSTITUTIONAL LIMIT OF INDEBTEDNESS.

In determining the indebtedness of a county of Colorado with reference to the limitation placed on such indebtedness by the state constitution,

debts created prior to August 1, 1876, when the state was admitted into the Union, and the constitution became effective, are not to be considered.

3. **SAME—EVIDENCE—STATEMENTS OF COUNTY FINANCES.**

Gen. St. 1883, p. 286, § 150, requires boards of county commissioners to make out semiannual statements at their regular sessions in January and July in each year, which statements shall show the indebtedness of the county in detail, and contain a detailed account of the receipts and expenditures for the preceding six months, and shall be published or posted as therein prescribed, and be entered of record by the clerk. *Held*, that statements designated "quarterly reports," which did not purport to have been made out through any action of the county board, nor conform to the requirements of the statute in giving details of receipts or expenditures, and which were not shown to have been published or posted, and were merely certified by the county clerk as being correct statements of the expenditures of the county as appeared from the books of his office, were not receivable in evidence, as the statements required to be made by the statute, to establish the indebtedness of the county at the times of their dates.

4. **SAME—STATEMENTS AS OFFICIAL RECORDS.**

Nor were such statements admissible, under the general rules of evidence, as official records to prove that the indebtedness of the county was the amount therein recited, being merely the conclusions of the clerk drawn from whatever books or papers he may have examined in reaching such result, and the books and records of the office being themselves the primary evidence of whatever facts they show.

5. **SAME—EVIDENCE OF DATE OF INDEBTEDNESS—DATE OF WARRANT OR CLAIM.**
Neither the date of a county warrant nor of the claim on which it was issued is evidence of the date of the creation of the indebtedness.

6. **SAME—RECITALS IN CLAIM.**

A recital in a claim filed against a county of the date when the services were rendered on account of which the claim is made is merely evidence of such date to go to the jury, and a court is not justified in basing its charge on the assumption that such recital is conclusive.

7. **SAME—COUNTY RECORDS AS EVIDENCE.**

Entries in the records of a county, made by the clerk in due course of business, either under the express provisions of a statute or in the usual course of official duty, are admissible in evidence in behalf of the county, and it is no objection to the admissibility of such an entry, offered for the purpose of showing the date when an indebtedness represented by a warrant sued on was created, that it was in the form of a tabulated statement of the expenses of an election held on a certain date, identifying by number, date, and name of payee the warrant in suit as one issued in payment for services rendered at such election.

8. **SAME—CLAIM FILED AGAINST COUNTY AS EVIDENCE.**

Where a county warrant declared on and introduced in evidence shows on its face that it was issued on account of a claim bearing a certain number, a certified copy of such claim from the county records is admissible on behalf of the county as evidence of the date of the rendition of the services for which the claim was filed.

9. **SAME—TRIAL—TABULATING EVIDENCE IN AID OF JURY.**

In an action against a county on a large number of warrants of different dates, tried to a jury, and contested on the ground that the indebtedness represented by such warrants was created when the county was indebted beyond the constitutional limit, which involves the ascertainment of the date of the creation of each item of such indebtedness, and of the indebtedness of the county on each of such dates, it is proper for the court, in aid of the jury, to admit the testimony of a competent person, who has prepared a tabulated statement in writing, summarizing the material facts shown by the books and records, which are themselves in evidence.

In Error to the Circuit Court of the United States for the District of Colorado.

E. F. Richardson (Thomas M. Patterson and Horace N. Hawkins, on the brief), for plaintiffs in error.

Charles M. Corlett, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. This action was brought to recover judgment on a number of county warrants issued by the defendant county in the years 1882, 1883, 1884, 1885, and 1886. Upon the trial before the court and jury the warrants were introduced in evidence, it being admitted that they were properly executed, the defense relied on being the claim that at the dates of the creation of the indebtedness represented by the warrants the county had incurred debts up to or in excess of the limit fixed by the constitution of Colorado, and therefore the indebtedness represented by the warrants sued on, and the warrants themselves, were invalid and void. Upon the conclusion of the evidence, the court, in effect, instructed the jury that the defense was sustained by the evidence, and that the verdict must be for the defendant. During the introduction of the evidence many exceptions were saved on behalf of the plaintiff, and upon these and the exceptions taken to the charge of the court, errors to the number of 68 are assigned, but it will not be necessary to consider these seriatim, as the questions presented thereby are controlled by a few general propositions.

In the course of the charge the court, referring to the warrants sued on, said to the jury that:

"There is no doubt about the honesty of these debts. These warrants were issued for claims which were good and valid against the county, but, the constitution having provided that a county shall not exceed certain limits in regard to its indebtedness, if they do, it cannot be collected."

Under such circumstances the introduction of the warrants, properly executed, and proof, which was introduced, of the ownership thereof by the plaintiff corporation, made out a prima facie case in favor of the plaintiff, and thereby the burden was placed upon the defendant county to prove by competent evidence the facts necessary to sustain the defense pleaded, to wit, that when the indebtedness represented by the warrants sued on was created the county was incapacitated from incurring the same by reason of the limitation imposed by the state constitution upon the debt-creating power of the county. *Board v. Standley* (Colo. Sup.) 49 Pac. 29. The constitution containing the limitation became operative on the 1st day of August, 1876, when Colorado was admitted into the Union as a state, and by its terms it is not applicable to debts contracted before its adoption; or, in other words, in determining whether a county has reached the constitutional limit, indebtedness created before August 1, 1876, is not to be included in the computation. *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651. For the purpose of proving the amount of the indebtedness existing against the defendant county at different dates, the defendant offered, and over the objection of plaintiff there was received, in evidence a number of reports, called "quarterly reports," certified to by the clerk of the county; and in the charge to the jury the court accepted the recitals contained in these reports as conclusive evidence of the

amount of the indebtedness then outstanding against the county; and thus we have presented the question whether these reports, or the recitals therein contained, were competent evidence on the issues arising in this case. In the General Statutes of Colorado for 1883 (page 286, § 150) it is enacted that:

"It shall be the duty of the board of county commissioners of each county, to make out semi-annual statements at the regular sessions in January and July, at which times, they shall have such statement published in some weekly newspaper, published in the county, if there be such published, and if there be no newspaper published in the county, such commissioners shall cause such statements to be posted in three conspicuous places in said county, one of which shall be at the court house door, and such statement shall show the amount of debt owing by the county, in what the debts consist, what payments if any have been made upon the same, the rate of interest that such debts are drawing; also detailed account of the receipts and expenditures of the county for the preceding months in which shall be shown, from what officer and on what account any money has been received and the amounts and to what individuals, and on what account any money has been paid and the amounts, and shall strike the balance showing amount of deficit, if any, and the balance in the treasury, if any, and the statement thus made, in addition to being published, as before specified, shall also be entered of record by the clerk of the board of county commissioners in a book to be kept by him for that purpose only, which book shall be open to the inspection of the public at all times."

Counsel for the defendant, in offering the reports, cited the section just quoted as the authority for their competency. The reports received in evidence were in the following form:

Quarterly Report of Expenditures of Rio Grande County for the Quarter
Ending September 30, 1882.

Total warrants outstanding July 1, 1882.....	\$50,721 61
On account of road	448 88
Warrants issued for quarter ending Sept. 30, 1882.	

Here follows statement of 17

Warrants issued for different purposes, aggregating.....	12,826 95
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	\$63,997 44
Principal D. N. & Summit Toll-Road bonds.....	6,000 00

Total wt. and bonded indebtedness Oct. 1, 1882.....	\$69,997 44
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"State of Colorado, County of Rio Grande—ss.: We, the undersigned, do hereby certify that the above and foregoing is a true and correct statement of the expenditures of Rio Grande county for the quarter ending Sept. 30, 1882, as appears from the books in the clerk's office of said county this 17th day of October, 1882.

_____, Chairman Bd. Commissioners.
"J. W. Ross, County Clerk."

The other reports put in evidence are in the same form, except the certificate, which, in some instances, reads:

"I, James W. Ross, county clerk, hereby certify that the foregoing is a true and correct statement of the expenditures of said county for the quarter ending [giving date], and of the financial condition of the same on said date.

"James W. Ross, County Clerk."

And in others is as follows:

"I, James W. Ross, county clerk, hereby certify that the foregoing is a true and correct statement of the expenditures of said county for the quarter ending June 30th, 1883, as appears from the books in my office this 30th day of June, 1883.
James W. Ross, County Clerk."

These reports do not purport to be the semiannual statements required by the statute above recited. They are headed "Quarterly Statements." They are not signed by or certified to by the board of commissioners of the county. They do not contain a detailed statement of the receipts and expenditures, nor do they strike a balance showing the condition of the county treasury. It does not appear that they were published or posted as the semiannual statements authorized by the statute, and, as they do not contain the facts required by the statute, and do not purport to represent any action taken by the board of commissioners of the county, they cannot be received as statements authorized to be made by section 150 of the General Statutes of 1883. Neither are they admissible under the rule that admits in evidence "official registers or records kept by persons in public office in which they are required, either by statute or by the nature of their office, to write down particular transactions occurring in the course of their public duties, or under their personal observation." 1 Greenl. Ev. § 483; *Evanston v. Gunn*, 99 U. S. 660; *White v. U. S.*, 164 U. S. 100, 17 Sup. Ct. 38; *In re Hirsch*, 74 Fed. 928.

The portion of these reports which the court relied on as proof conclusive of the amount of indebtedness owing by the county is the recital therein that at a given date the outstanding warrants of the county amounted to a named sum. This statement is merely a conclusion drawn by the clerk from whatever books or papers he may have examined in reaching the result stated. It is entirely clear that it would not have been permissible to defendant to have called as a witness the clerk of the county, and to have asked him what he found, upon examination of the county records, was the indebtedness of the county in the years 1882, 1883, and so on, because such evidence would be hearsay, and would be substituting the judgment of the witness for that of the jury upon one of the material matters in issue in the case. If the records of the county contain any competent evidence tending to show the amount of the indebtedness of the county at any particular date, the records would be the primary evidence, and these should be introduced, instead of a bare recital, such as is found in the reports in question. It will be noticed that these reports do not state that they are copies of any records, or of any entries upon the records, of the county, but only state that on a given date the amount of the outstanding warrants was a named sum; and in none of the certificates signed by James W. Ross, as clerk, is it certified that the amount named is correct. But, even if the certificates did so certify, we are not aware of any rule of evidence which would justify the reception of such statements in evidence, when it clearly appears that the same are but conclusions of the clerk, drawn, possibly, from his examination of the records in his charge; although that is not made clear. As already stated, the court, in the charge to the jury, relied solely upon the recitals found in the quarterly report for June 30, 1882, as the evidence justifying the final instruction to the jury to find for the defendant; and, as we hold that the recitals in these reports of the amount of outstanding warrants were not competent evidence, it follows that it was error to admit them in evidence, and, eliminating them

from consideration, there was no foundation to sustain the action of the court in directing a verdict for the defendant.

In support of the defense relied upon, it was also incumbent on the defendant to prove the date of the creation of the indebtedness, evidenced by the several warrants sued on, as that was a necessary step in ascertaining whether the indebtedness, when created, exceeded the constitutional limit; and in support of its contention in this respect the defendant offered in evidence a large number of bills or accounts in favor of various parties and against the county, which were tabulated in Exhibits 3 and 4, to which objection was made that there was no competent evidence showing the time of the creation of the claims represented by these accounts, and thereupon the court ruled that, where the account showed the date when the services were rendered, it would be received as showing the date of the creation of the indebtedness; that where the date of the rendition of the service was not stated on the bill, but the account was dated, that would be accepted as the date of the accruing of the indebtedness; and that where the account was not dated, and failed to state the date of the rendition of the service, the date of the warrant issued therefor would be taken as the date of the accruing of the indebtedness. In this ruling the trial court was clearly in error. There is no presumption of law that an indebtedness for which a county warrant is issued did not exist at a date prior to that of the warrant, and, as a matter of fact, it is well known that, as a rule, warrants are issued as evidence of a pre-existing indebtedness; and therefore the court was not justified in assuming that the indebtedness was created at the date of the warrant, simply because the defendant was unable to show when the debt was created. *Board v. Standley* (Colo. Sup.) 49 Pac. 29; *People v. Board of Com'rs* (Colo. App.) 52 Pac. 748; *Wilder v. Board of Co. Com'rs*, 41 Fed. 572.

So, also, it was error to accept the mere date of an account as evidence of the creation of the indebtedness represented by the items thereof, for it is apparent that in such cases the date is intended to show the time of the rendition of the account, and not the time of the rendition of the services. In the cases wherein the accounts or bills set forth the dates of the rendition of the services, the utmost that could be claimed therefor would be that such statements could be considered in connection with any other facts tending to show when the services were rendered, it being for the jury to determine from the entire evidence whether the date of the rendition of the services was proven or not; and clearly, therefore, the court erred in ruling that, where the items of the account were dated, such dates would be taken as conclusive, which was the effect of its ruling on this point.

Error is also assigned upon the action of the court in admitting in evidence what is termed in the record "Defendant's Exhibit No. 1," which is a duly-certified copy of a tabulated statement of the expenses incurred at the November election in 1883, and which shows the fees earned by the judges, clerks, and canvassers in the several election precincts of the county, and which exhibit was offered for the purpose of proving that George W. Stoner had earned a fee of \$2.50 as clerk in precinct No. 5, for which it was claimed warrant No. 3,632 had

been issued,—that being one of the warrants declared on by the plaintiff company, and the evidence being offered to show when the debt accrued for which the warrant was issued. With reference to this class of evidence the rule is that entries made in due course of business in the records of a county, either under the express provisions of a statute or in the usual course of official duty, may be introduced in evidence, when pertinent to an issue in dispute, either by the production of the original record or by a duly-certified copy. Underh. Ev. § 142c; 1 Greenl. Ev. § 483. It is suggested that this general rule ought not to be held applicable in cases to which the county is a party, and wherein the county seeks to make evidence, in its own behalf, out of entries upon its own records. In this case the entries, when made, were against the interest of the county, being admissions of indebtedness against it, and were made at a time which precludes the assumption that they were made for the purpose of manufacturing evidence to be used in defeating the claims sued on in this case; and we do not see any good reason why the entries are not competent on behalf of the county, if they would be competent on behalf of any resident thereof.

In 1 Greenl. Ev. § 483, in commenting on the question, it is said:

"The extraordinary degree of confidence, it has been remarked, which is reposed in such documents, is founded principally upon the circumstance that they have been made by authorized and accredited agents appointed for the purpose; but partly also on the publicity of their subject-matter. Where the particular facts are inquired into and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are in fact the agents of all the individuals who compose the state; and every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence, and it is not necessary that they should be confirmed and sanctioned by the ordinary tests of truth."

In Underh. Ev. § 142c, in discussing the admissibility of entries constituting portions of the public records, it is said:

"The general notoriety of the matters to which such entries relate, the public and official character of the books and of those who keep them, the fact that the entries are made by an officer who is under oath, that they are required or authorized to be made by law, or else are made in the usual course of official duty, without any present motive to misrepresent, combine to give the evidence obtained from such sources peculiar force and value. To give an official character to a public record or register it is not essential that it should have been authorized or ordered to be kept by statute. It is the duty, if not the right, of every official to keep a record of his public transactions whenever such a practice is a common and appropriate mode of evidencing them. This record, whether required to be kept by statute or not, is a public record."

In *Owings v. Speed*, 5 Wheat. 420, the supreme court, Mr. Chief Justice Marshall speaking for the court, said:

"There was also an exception taken to the opinion of the court in allowing the book of the board of trustees [of Bardstown, Ky.], in which their proceedings were recorded, and other records belonging to the corporation, to be given in evidence. The book was proved by the present clerk, who also proved the handwriting of the first clerk and of the president, who were dead. The trustees were established by the legislature for public purposes. The books of such a body are the best evidence of their acts, and ought to be admitted whenever those acts are to be proved."

In Dill. Mun. Corp. § 304, the rule is stated to be that:

"A public or municipal corporation, required by law to keep a record of its public or official proceedings, may itself use such records as evidence in suits to which it is a party; but the records must first be properly authenticated."

It will be borne in mind that this Exhibit 1 was not offered in evidence to establish the existence of a disputed claim against the county, or to show that a particular claim had been allowed by the county authorities, but it was offered by the defendant as evidence tending to show the date of the creation of the indebtedness represented by warrant No. 3,632, being one of the warrants sued on by the plaintiff company. In the petition the form of the warrants sued on is set forth, and it thus appears that each warrant on its face recites the number of the bill for which it was issued, and in the tenth paragraph of the petition it is averred:

"That prior to the 27th day of January, 1887, the said board of county commissioners audited and allowed the claims of various persons against said county, and thereupon warrants were issued in said form by said board in number and amount and to the persons as hereinafter set forth in Exhibit A, hereunto attached, and made part hereof, and for the purposes and services mentioned in said Exhibit A."

This exhibit thus attached to and made part of the petition is a tabulated statement of the warrants sued on, in the following form:

No.	Date.	To Whom.	For What.	Registered.	Amt.
3632	Jan. 8, '84	Geo. W. Stoner.	Election.	Nov. 10, 1885.	\$2.50

If this exhibit had given the date of the election at which the services were rendered for which warrant No. 3,632 was issued to George W. Stoner, it would not have been necessary for the defendant to introduce evidence on that point; but, as the date was not given, it became necessary to prove the same, and it was to that end that Exhibit 1 was offered and received in evidence. This warrant, No. 3,632, upon its face showed that it had been issued for a bill bearing the number 2,563, and therefore pointed to that bill as the proper source of information for determining the consideration for which the warrant was issued, and thereupon the defendant offered a properly certified copy of the bill, it being the Exhibit 1 to which exception was taken by the plaintiff company. It will be noticed that in the petition it was averred, in substance, that the board of commissioners of the defendant county had properly allowed the claim of George W. Stoner in the sum of \$2.50 for election services rendered to the county, and for such claim had issued to him warrant No. 3,632, and upon the introduction of this warrant in evidence it appeared on its face that the bill for which it was issued was numbered 2,563, and this bill, thus numbered, was then offered as evidence upon the point of the date of the services for which the warrant was issued. As we understand it, it is the custom, in keeping the records of the county, to number each bill that is presented to and allowed by the commissioners, and, when warrants are made out, they refer to the number of the bill for which they are

issued, and thus a convenient record is made for connecting the warrants with the claims for which they are issued. The mere fact that Exhibit 1 is in the form of a tabulated statement made by the county clerk of the expenses incurred at the election of November, 1883, is immaterial, because it appears that the statement in this form became bill No. 2,563, in part payment of which warrant No. 3,632 was issued; and in plaintiff's petition, as already stated, it is averred that the claims for which the warrants sued on were issued were all audited and allowed by the county board of commissioners. In other words, the plaintiff company, by the averments in the petition and the evidence offered by it, admitted that warrant No. 3,632 was issued January 8, 1884, to George W. Stoner, for election services rendered the county, the bill for which the warrant was issued being numbered 2,563. Under these circumstances we hold it was open to the defendant county to introduce bill No. 2,563 in evidence for the purpose of throwing light upon the question of the date of the services for which warrant No. 3,632 was issued. Unless evidence of this character can be admitted, it would be practically impossible for the county to connect the warrants sued on with the services for which they were issued, after the lapse of so many years; and as these bills form part of the records of the county, and were made under circumstances which preclude the idea that they were made in the interest of the county as self-serving declarations, we hold that the same were admissible upon the issue involved.

A number of exceptions were taken to the testimony of John W. Crump, a witness on behalf of the defendant county, who had prepared tabulated statements from the records and books of the county, and which were admitted in evidence. It is clearly apparent that on the trial of a case of this character before a jury, which involved the ascertainment of the amount of the indebtedness of the county on many different dates through a period of a number of years, and also required proof of the dates of the creation of the debts represented by the warrants sued on, it would be absolutely impossible for the jury to retain in their memories the dates and amounts of the numberless items put in evidence, and it would be difficult for them to take memoranda thereof; and yet, without such an aid to their memories, it would be impossible for them to reach an intelligent verdict. In such cases it is admissible to pursue the method adopted by the trial court; that is, to have the books, papers, and other items of original evidence offered and received, and, in connection therewith, to admit the testimony of a competent person, who has prepared a tabulated statement in writing, summarizing the numerous items offered in evidence. The original sources of information being in evidence, the correctness of the tabulated statement can be readily verified by an examination of the witness, and a comparison with the sources from which the statement has been compiled, and, being thus verified, it becomes a valuable aid to the jury. Where, however, statements of this kind are offered in connection with the testimony of the person who has tabulated the same, care must be taken to confine the same to matters included within the primary evidence properly introduced, for this method of summarizing, for convenience sake, numerous items, giving the date and

amounts, cannot be made a means of putting before the jury the conclusions of the witness drawn from sources of information which are not in evidence. For the reasons stated, we hold it was error to direct a verdict for the defendant, and the judgment must therefore be reversed, and the case be remanded to the circuit court, with instructions to grant a new trial.

CENTRAL TRUST CO. OF NEW YORK v. WORCESTER CYCLE MFG. CO.

(Circuit Court, D. Connecticut. October 24, 1898.)

RECEIVERS—EFFECT OF APPOINTMENT—FORECLOSURE OF MORTGAGE.

The appointment of a receiver in a foreclosure suit does not constitute a taking of possession of the property by the mortgagee, as against other creditors, nor affect priorities, but the receiver holds possession for all parties interested.

Butler, Notman, Joline & Mynderse and Cardoza & Nathan, for complainant.

C. Walter Artz, for receiver.

Seymour C. Loomis, for trustee.

Breed & Abbott, Perkins & Jackson, A. L. Fele, and McBurney & McBurney, and others, for attaching creditors.

TOWNSEND, District Judge. A statement of the facts herein will be found in the opinion of this court in *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 86 Fed. 35. Upon appeal, the circuit court of appeals modified the decree of this court so as to permit the trustee in insolvency to be heard as to the rights of the creditors of the defendant in its property or the proceeds thereof. The parties have since taken testimony, and filed a stipulation, from which it appears that, at the time of the commencement of this suit, the defendant was the owner of certain bicycles, stock, supplies, and machinery; that a part thereof was acquired before, and a part after, the making and recording of the mortgage herein; that all of said property was then in the possession of the sheriff, under certain writs of attachment, in suits by the creditors of defendant; that, with their consent, the receiver took, and now holds, possession of the property in dispute; and that, at the commencement of this suit, there were certain choses in action belonging to this defendant, a part of which the receiver has collected. Furthermore, the American Surety Company of New York has appeared by its counsel, who represented that it held a first mortgage upon that part of the property herein sought to be foreclosed, which is situated at Middletown, in the state of Connecticut, and that \$85,000 and interest remains unpaid upon said mortgage, and is now due and payable. A suit brought by said American Surety Company to foreclose its said mortgage, returnable to the September rule day, 1898, is now pending in this court, to which suit the complainant and defendant herein are parties defendant. In view of these facts, it is unnecessary to finally determine the right of possession of the property in dispute, as between the receiver and trustee, until the value of said property and the amount of the claims of the parties have been ascertained. Let

an order be entered that said attaching creditors, on or before November 15, 1898, file with the receiver or the clerk of this court a statement, under oath, of the amounts of their claims against the defendant, and that the receiver, on or before November 15, 1898, ascertain and report, as fully as may be, the condition of the estate, the present condition and value of the property in dispute, and the character and amount of liabilities, secured and unsecured, due the creditors, so far as the same can be ascertained from the books of said corporation, and, further, make report to the court of his doings as receiver in carrying on the business of the defendant.

November 23, 1898.

The receiver has now filed his report, showing that there are in his hands assets, aside from machinery, of the value of \$85,000, and that the receiver's liabilities aggregate nearly \$60,000. In addition to this amount, there are first mortgages for \$165,000; the mortgage claimed by complainant, made at the time the defendant corporation was organized, for \$320,000; and about \$227,000 of unsecured indebtedness by notes and open accounts, apparently incurred for operating expenses since the defendant corporation was organized. The defendant appears to have carried on business for about one year, and the bonds issued by complainant were apparently turned over to the persons who had formed the defendant corporation. It is evident that said unsecured creditors will receive nothing, if complainant's mortgage is upheld. In these circumstances, complainant is bound to furnish satisfactory proof that the bonds in suit were issued bona fide and for value. The trustee in insolvency, on behalf of the general creditors, has interposed three defenses, as follows: (1) The mortgage indebtedness is not proved; (2) the suit was prematurely brought; (3) the mortgage is invalid as to all property not particularly described.

As to the first point, the treasurer of the complainant's corporation testified, on his direct examination, that the whole \$320,000 outstanding in mortgage bonds was sold at par and interest to various parties. Afterwards, on cross-examination, he testified that he believed they were all issued in exchange for notes held by a former company. The notes were not produced, nor was any definite statement furnished in regard to them. I think the evidence is not sufficient to justify a decree.

As to the second point, I think the suit was not prematurely brought, at least so far as the interest due on the bonds at the time of its commencement is concerned. The case seems to be directly within the rule laid down by Judge, now Mr. Justice, Brewer, in *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.*, 36 Fed. 221, where the language of the mortgage was the same as in this case.

As to the third point, in my former opinion I stated that I thought the rights of the mortgagee were superior to those of the trustee. Since that time the question has been more fully argued, additional cases have been cited by counsel, and I have re-examined the whole subject. In view of the case of *Ellis v. Railroad Co.*, 107 Mass. 1, cited by counsel, and especially in view of the decision in *Poland v. Railroad Co.*, 52 Vt. 144, which was not cited by either counsel, I

think I was mistaken in applying the general doctrine of the cases cited in my opinion to the special circumstances of this case. In any event, as there will undoubtedly be an appeal from this decision, and as it is desirable, in view of the facts already stated, to have all doubtful questions speedily and finally settled with the least possible expense, I think it best to decide all these questions in favor of the intervening trustee, and to hold that the mortgage indebtedness is not sufficiently proved, that the suit was prematurely brought, and that the mortgage is invalid as to personalty situated in the state of Connecticut.

D'ESTERRE v. CITY OF BROOKLYN et al.

(Circuit Court, E. D. New York. November 26, 1898.)

1. MUNICIPAL BONDS—POWER TO MAKE NEGOTIABLE.

Negotiability is a usual and valuable feature of municipal bonds, and a statute authorizing the issuance of bonds by municipalities will be construed as giving power to make them negotiable, in the absence of provisions clearly showing a contrary intention.

2. SAME—EFFECT OF RECITAL IN BONDS.

A recital in a municipal bond that it is issued in pursuance of a statute referred to is conclusive against the municipality only as to matters of fact, and does not estop it from denying the power of its officers to issue such a bond under the statute.

3. SAME—CONSTRUCTION OF STATUTE—REGISTERED BONDS.

The New York statute of 1892, as amended in 1893, provides for the issuance by municipalities of either coupon or registered bonds, giving the forms and requisites of each; among other things specifying that in the case of registered bonds having no coupons "the bond shall also be made payable to the person to whom it is issued, instead of to bearer." Laws 1893, c. 171, § 8. It contains no provision that such bonds may not be made payable to the order of the person to whom they are issued, but provides that "the bonds, as they may be sold by the payees, may, on the dates thereof, be registered in the name of the new purchasers." *Id.* *Held*, that it was not intended that registered bonds should not be negotiable, and that upon their subsequent transfer, which was evidently contemplated by the law, they should remain subject, in the hands of a bona fide purchaser, to equities existing against the original payees.

4. SAME—TRANSFER—DEFENSES AGAINST FORMER HOLDER.

Such bonds being negotiable when issued in strict conformity to the statute, the fact that bonds are issued thereunder by a town with the place for the name of the payee left blank, where in all other respects they comply with the requirements of the law, and contain a certificate of their registry, does not charge a subsequent purchaser with notice of defenses existing against them in the hands of the person to whom they were issued. Such an omission is merely an irregularity, which would at most only put the purchaser on inquiry as to whether they had in fact been issued to the person through whom he acquired them.

5. SAME—EFFECT OF REGISTRY.

The registration of municipal bonds does not deprive them of their negotiable quality, when voluntarily transferred by their owner.

6. SAME—EFFECT OF CERTIFICATE OF REGISTRATION.

An indorsement on a municipal bond, when it is issued, that it is registered, though not signed by the officers of the municipality, is a part of the bond, and, in connection with a recital that the bond is issued in pursuance of a statute which requires its registration, estops the municipality from denying its registration.

7. SAME—BONA FIDE PURCHASER—HOLDER AS COLLATERAL SECURITY.

One who receives municipal bonds, before their maturity, as collateral security for an antecedent debt, and surrenders other collateral therefor, is a bona fide purchaser.

This is a suit by James C. E. D'Esterre against the city of Brooklyn and George W. Palmer, as comptroller of the city of Brooklyn, to establish the validity and compel the registration of bonds issued by the town of Gravesend before its annexation to the city of Brooklyn.

Henry B. B. Stapler and Frank Hiscock, for complainant.

John Whalen, Corp. Counsel, and Wm. J. Carr, for defendants.

THOMAS, District Judge. In 1894 the state of New York annexed to the city of Brooklyn the territory of the town of Gravesend, and provided for the continued obligation of such town for its existing debts, and the payment thereof, by taxation at the instance of the city of Brooklyn, which, by the Laws of 1897, became consolidated with the city of New York. During its independent existence, and in January, 1894, the town of Gravesend, through its authorized and qualified officers, issued bonds to the amount of \$148,000 for the purpose of raising funds to pay certain local improvement bonds maturing during that year. On January 18, 1894, these bonds were delivered by the supervisor of the town to the firm of Coffin & Stanton, brokers, doing business in the city of New York, and on the succeeding 2d day of February Coffin & Stanton pledged \$24,000 of such bonds to the complainant to secure an antecedent debt of \$23,040, in consideration whereof the complainant surrendered to Coffin & Stanton certain other bonds, of the value of \$24,000. The complainant, at the time of such substitution of securities, had no notice or knowledge of any defect in the bonds or the proceedings for the issuing thereof, save such notice or knowledge, actual or constructive, as he received from an inspection of the bonds themselves, and from the enabling statute, which was passed in 1892, and amended in 1893. This suit is to establish the validity of such bonds, to compel the registration thereof, and to recover the interest accrued due thereon. It is urged by the defendants that the complainant should be denied such relief, upon the ground that he is not such a bona fide holder thereof as to preclude such defenses as were open to the town against Coffin & Stanton. That firm did not have complete title, and could not have recovered upon the bonds, for the sufficient reason that, in violation of the statute, they bought them on credit, and never paid any part of the purchase price,—at least beyond the sum of \$10,000. There is no other defect in the proceedings for issuing the bonds, or in their form, that invalidated them in the hands of Coffin & Stanton. The inquiry, then, is, can the defense of nonpayment by Coffin & Stanton be maintained against the complainant? The answer involves two inquiries, viz.: (1) Did the statute authorize the issue of the bonds in a negotiable form? (2) If so, was the plaintiff a bona fide purchaser? The act prescribes a form of coupon bond containing this provision: "This bond shall be registered as to the principal sum herein provided to be paid." Laws 1893, c. 171, § 8. Following this statutory form of a *coupon bond* was this:

"In the case of registered bonds the language in the bond at the heading shall be registered instead of coupon, and the provision as to the surrendering of interest coupons shall be omitted. The bond shall also be made payable to the person to whom it is issued instead of to bearer. A certificate showing the registration of the bond shall be endorsed thereon. The bonds as they may be sold by the payees may on the dates thereof be registered in the name of the new purchasers, the new name in each case to be shown in the certificate of the registry."

The words "registered bonds," as above used, refer to certain classes of bonds for which provision is made earlier in the act, where the language is, "They [the bonds] may be either coupon or registered bonds, or coupon bonds registered as to the principal only." From these provisions it was contemplated, seemingly, that the bonds might be (1) coupon bonds, or coupon bonds registered as to principal only; (2) registered bonds, without coupons. The bonds in question were without coupons, and hence fell under the class designated as "registered bonds." On its face each bond is described as "Local Improvement Loan Registered Bond," and a certificate of registration is indorsed thereon. Thus it appears that by certain words of the statute a coupon bond, registered or otherwise, shall be payable to bearer, while a registered bond shall be "made payable to the person to whom it is issued instead of to bearer." Each of the bonds issued provides: "Know all men * * * that the town of Gravesend * * * acknowledges that it owes * * * the sum of one thousand dollars, * * * which sum the said town hereby engages and promises to pay, * * * with interest thereon," etc. Hence the bonds were registered bonds, with the payee's name omitted. Such bonds, in form, are equivalent to bonds payable to the holder as bearer, and he may fill up the blank with his own name, or make them payable to himself or bearer, or to order. *White v. Railroad Co.*, 21 How. 575. See, also, *Supervisors v. Galbraith*, 99 U. S. 214. If there were no other defect in issuing the bonds save the omission of the payee's name, a court of equity could direct that the payee's name be inserted, and such omission itself would not invalidate bonds. But this is not the point under inquiry, but, rather, did the statute require that registered bonds should be payable to the person to whom they were issued, with the effect of depriving them of such negotiable quality as would protect a bona fide purchaser against prior equities? If Coffin & Stanton had paid for the bonds, there would have been no equity in favor of the town on account of the omission of the payee's name; but, as Coffin & Stanton did not so pay, then the bonds were not enforceable by them, nor by their transferee, unless they were negotiable. The Revised Statutes of New York (part 2, c. 4, tit. 2) provide:

"Section 1. All notes in writing, made and signed by any person, whereby he shall promise to pay to any other person or his order, or to the order of any other person, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed; and shall have the same effect, and be negotiable in like manner as inland bills of exchange, according to the custom of merchants."

The law merchant regards instruments as negotiable, so as to be free from prior equities in the hands of bona fide purchasers, when the obligation is payable to bearer, or to a designated person or his order, and

exposes to the effect of such equities instruments payable to an individual. *Evertson v. Bank*, 66 N. Y. 14, 19; *McClelland v. Railroad Co.*, 110 N. Y. 469, 475, 18 N. E. 237; *Carnwright v. Gray*, 127 N. Y. 92, 27 N. E. 835; *School Dist. v. Hall*, 113 U. S. 135, 139, 5 Sup. Ct. 371; *Manufacturing Co. v. Bradley*, 105 U. S. 175, 180; *Norton, Bills & N.* 13-16. See, also, *Gerard v. La Coste*, 1 Dall. 194; *Barriere v. Nairac*, 2 Dall. 249. It is true that the bonds in the case at bar are payable in blank, and hence payable to bearer; but the question is not whether the town officers have issued a negotiable instrument, but rather whether the statute directed that the instrument should be issued in a nonnegotiable form. The fact that the officers certified that the bonds were issued pursuant to the act can only estop the town touching matters of fact, and not as to the power of the officers to make the contract. *Katzenberger v. Aberdeen*, 121 U. S. 172, 176, 7 Sup. Ct. 947. The purchaser is presumed to have cognizance of the statute, and to know the powers conferred thereby on the officers of the town, and it is his duty to compare the instruments which he proposes to purchase with the statute. If, upon such comparison, he finds that the power exists, he is not required, unless there be something brought to his attention by the appearance of the instruments or extrinsically, to search with a view of ascertaining whether the town officers have performed each preliminary duty devolved upon them. *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 142; *President, etc., v. Cornen*, 37 N. Y. 320. Their recital of the performance of such duty is usually, as it is in this case, sufficient. The holding in *Knox Co. v. Aspinwall*, 21 How. 539, has been followed through a long line of cases, and in its essential holding is of undiminished authority. *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803. But if the enabling statute commands certain bonds to be made in a nonnegotiable form, then the purchaser is deemed to have knowledge of such provision, and to subject his rights to the effect of such statute. *Commissioners v. Bolles*, 94 U. S. 104; *Marcy v. Oswego Tp.*, 92 U. S. 637; *Commissioners v. Clark*, 94 U. S. 278; *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. 819. If, then, in the case at bar, the statute, by directing that "the bond shall also be made payable to the person to whom it is issued, instead of to bearer," intended to direct the issue of the class of bond described as "registered bonds" only in a nonnegotiable form, the complainant must be presumed to have had knowledge thereof, and to have purchased the bonds in question knowing that they were subject to any defenses existing against Coffin & Stanton. The words above quoted, standing alone, and uninfluenced by any other provision of the statute, seem to point to such construction, but a more comprehensive consideration of the statute authorizes the conclusion that such is not its spirit and intention. It will be noticed that the statute prescribes that "registered bonds" shall not be made payable to bearer, but does not expressly prohibit a provision for payment to the order of the person to whom they are issued. Hence, if they may be made payable to the order of such person, or if it may be gathered that the statute intended that the bonds should be negotiable, the court may ascribe to them a negotiable quality. *Norton, Bills & N.* 13-16. It is permissible to consider in this connection that municipal bonds are usually negotiable.

An examination of the enabling statutes would illustrate that power to issue negotiable bonds is seldom, if ever, negatived. This condition exists for the very sufficient reason that such bonds are intended to pass by delivery or by indorsement, in order to give them marketable value. The bonds of a municipality, payable, as are these in question, after a long interval of time, would meet neither with ready sale, nor the most valuable return to the town, if they were subject to all the possible defenses to which nonnegotiable paper is exposed. The statute under consideration authorized a general issue of bonds, and, in the absence of restrictive words, the power would be implied to give them a negotiable form. *People v. Mead*, 24 N. Y. 114, 125. Moreover, the statute directed that all coupon bonds should be made payable to bearer, and it is not to be presumed that in respect to negotiability it intended to differentiate in the quality of classes of bonds issuable under the act. Indeed, the intention to give the registered bonds the form and attributes of commercial paper is to an extent inferable from the very words of the statute, which provide for their circulation. It enacts that "the bonds as they may be sold by the payees may on the dates thereof be registered in the names of the new purchasers, the new name in each case to be shown in the certificate of the registry." The word "payees" has a significance that to some extent indicates the legislative intention. It would seem that from the use of the word "payees" the legislature did not intend to limit the power to the mere issue of an ordinary nonnegotiable bond, in which case the term "obligee" would have been used more suitably. It is true that the person to whom the promise of payment is made in a nonnegotiable note may be properly described as a "payee," but such a word, when used in connection with an issue of municipal bonds, which are universally negotiable, would tend to show that negotiable bonds were intended. But can it be seriously urged that the legislature did not intend that these instruments should possess the same power to circulate that belongs to negotiable registered bonds? The statute certainly contemplated transfers of the bonds by the payees, and gave the purchasers the right "on the dates thereof" to have their names registered. What is the meaning of this provision? Is it that the bonds should be sold, and the right of registration exercised, provided the town had no defenses to the bonds? Would any intelligent person, any person not the dupe of the statute, purchase them under such conditions? Does the statute hold out a right of sale and promise of registration, and cunningly reserve the right to forfeit the bonds against all subsequent purchasers, by reason of some concealed extrinsic fact attributable to the misconduct of the officers of the town? This court will not assist in the municipal dishonor that attends repudiation by ascribing such intention to the legislature. The facts that statutes of this kind intend that municipal bonds shall be negotiable; that this statute, unlimited by positive legislation, would authorize negotiable instruments; that it prescribes that coupon bonds should be negotiable; that it does not command that a "registered bond" should not be payable to the order of the person to whom it was issued; that it characterizes the first purchasers as "payees," and contemplates sale of the bonds, and unqualifiedly endows the purchasers from such payees with the right "on the date of sale" to register the bonds,—

furnish strong evidence that it did not intend to deprive such "registered bonds" of the attributes of commercial paper beyond the limit that usually accompanies registered bonds. It should be kept in mind, in determining this question, that a power to issue municipal bonds, unless restricted, authorizes the issue of bonds in a negotiable form, and the modern necessity and practice of issuing bonds in such form require the interpretation of the enabling act favorably to the power so to do, unless the language of the statutes clearly prohibits the same. And it must also be considered that, if a municipality could, under any circumstances, issue negotiable instruments, a bona fide purchaser may presume that they were duly issued. *San Antonio v. Mehaffy*, 96 U. S. 312. But how far does registration limit negotiability? Registered bonds are not deprived wholly of their negotiable character by registration. Indeed, registration is principally desirable because the bonds are negotiable. A negotiable instrument is, by registration, to an extent deprived of its negotiable quality; but this disability is removable by the voluntary transfer by the owner of the instrument to another. Thereupon the town must, upon application, register it in the name of the new holder. The registration of such an instrument does not have the effect of subjecting it to any defenses existing against the persons in whose name it is first registered. Such is not at all the purpose of registration. It is now a usual custom to register municipal bonds, but it is a proposition as startling as it is untenable that bonds thereby lose their capacity to be negotiated by the owner, so as to pass by his authorization into the hands of subsequent holders, relieved from prior equities. Negotiability may be suspended pending a transfer by the owner. The New York statute (Laws 1870, c. 438) provides that an owner may render bonds nonnegotiable by certain indorsements thereon, and they remain nonnegotiable, except by the owner's indorsement. A provision for registration has the same, and no greater, effect. The New York statute (Laws 1869, c. 907, § 8) permits the registration of bonds issued by towns in aid of railways. Bonds so registered do not become nonnegotiable. In *Lewis v. Commissioners*, 105 U. S. 739, *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803, *Commissioners v. Rose*, 140 U. S. 71, 11 Sup. Ct. 710, and numerous other cases, the argument employed to sustain the bonds was to the effect that they were apparently registered, and that this was sufficient evidence thereof in behalf of a bona fide purchaser. The conclusion is reached that the statute intended that the registered bonds should be negotiable securities, and that the complainant purchased them for such consideration that he was a bona fide holder, unless the blank in the bonds gave him notice of some irregularity in their issue, because the name of the person to whom they were issued was omitted from the bonds. Prior to the issue of the bonds in question, the town had issued registered bonds to the amount of \$457,000, with the payee's name in blank, and the validity of such bonds has not been questioned by the town, whatever importance may be attached to that fact. Although the bonds were not registered, as will later appear, the town is estopped to affirm that fact, and the purchaser could justly indulge the presumption that Coffin & Stanton were authorized to insert their name in the blank. The proposition of the defendants is narrowed to this: that when bonds are offered as

collateral security, by reputable brokers in the city of New York, if they appear to be intended for registered bonds, and are certified to be registered, yet, if the first payee's name is not inserted in the bonds, the pledgee will be charged with bad faith in receiving the bonds, on account of such omission; that is, what would be at most a mere irregularity is converted into evidence that a condition precedent to the issuing of the bonds had not been met. If the blank gave the complainant notice of anything, of what defect should it have excited suspicion? That the bonds had not been duly issued to somebody? How could that be, when the bonds had in all other respects the appearance of having been marketed, as evidenced by certification of the town officers, and by their possession by a person not connected with the town? It may be that such blank would place upon the complainant the peril of the bonds having been issued to some other person than Coffin & Stanton. But the bonds were issued to Coffin & Stanton, and if the complainant had inquired of the town officers he would have learned that fact, and that fact was the only one involved in the inquiry which it is claimed he was bound to make. But why should a proposed purchaser, from the existence of the blank, be called upon to suspect that the payee, whose name was omitted, had not paid for the bonds, for that is the only possible defense to these bonds even in Coffin & Stanton's hands? An omission in the bonds is not cognate to such grounds of defense, and would not suggest itself to any person, however prudent. The complainant was justified in believing (1) that there was a statute authorizing the issuing of negotiable bonds; (2) that all conditions precedent or acts of compliance with the statute had been met; (3) that the bonds had been duly issued to somebody, and accordingly registered. Thereupon he was justified in believing that the omission of the name of the purchaser from the town was a mere oversight, and such an irregularity as could be cured at any time by the presentation of the bonds to the town treasurer, by the persons to whom they were issued, or their transferees. As the complainant took the bonds as collateral security, he was not interested to have the bonds transferred upon the registry until default should have been made in payment of the debt thus secured, inasmuch as the principal was payable in 40 years, and he was not concerned for the interest, until default should have been made in the payment of his debt. Until such default, it was suitable, if the complainant so willed, to leave the registration in its then condition. It has been stated above that the complainant is not affected by the fact that the bonds were not registered. The complainant urges that such registration was not a condition precedent to the issue of the bonds, as in the case of *Anthony v. Jasper Co.*, 101 U. S. 693, but was directory. First Nat. Bank of North Bennington v. Town of Arlington, 16 Blatchf. 57, Fed. Cas. No. 4,806. The registration was not a condition precedent to the issue of the bonds, but, of course, a bond issued as a "registered bond" should be registered. But the purchaser could infer the fact from the certification of registration indorsed on the bond (*Rock Creek Tp. v. Strong*, 96 U. S. 271; *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803), for the statute provides that "a certificate showing the registration of the bond shall be indorsed thereon." The bonds bear this indorsement: "This bond is registered in town treasurer's office, Gravesend." This indorsement is

a part of the bond. 4 Am. & Eng. Enc. Law (2d Ed.) pp. 139-142; *Benedict v. Cowden*, 49 N. Y. 396; *Dinsmore v. Duncan*, 57 N. Y. 573. It is true that the certificate is not signed by the town treasurer, but the bonds are signed by the supervisor, town clerk, and town treasurer, in whom the statute vested the power to select the place of registration, and each bond has this recital on its face: "This bond is issued under and in pursuance of an act of the legislature of the state of New York entitled 'An act in relation to local improvements in the town of Gravesend, in the county of Kings,' passed on the 10th day of March, 1892." Such recital is sufficient in form (*School Dist. v. Stone*, 106 U. S. 183, 187, 1 Sup. Ct. 84), and, in connection with the certificate of registration, sufficiently represented to the complainant that it was a registered bond, and thereby estops the town from asserting the nonregistration.

From these views it results that the complainant is a bona fide purchaser, for the surrender of the bonds held first by him as collateral security, and the substitution of the bonds in suit, furnished a good consideration (*Goodman v. Simonds*, 20 How. 343); and, moreover, the transfer of negotiable paper before maturity to a creditor, merely as security for an antecedent debt, makes the taker thereof a bona fide holder (*Brooklyn City & N. R. Co. v. National Bank of New York*, 102 U. S. 14; *File Co. v. Garrett*, 110 U. S. 288, 4 Sup. Ct. 90). It is considered that the complainant is entitled to a decree protecting his holding of the bonds to the extent of the debt and interest for which they were pledged as security. Such decree will be settled by the court in the usual manner. However, it seems equitable that the bonds should be surrendered to the town, and canceled, at its option, upon the payment by it of the debt, for the securing of which the bonds were pledged by Coffin & Stanton, unless some objection not appearing in the record exists thereto. Such question is reserved until the presentation of the decree. The complainant should have costs.

CENTRAL TRUST CO. OF NEW YORK v. HENNEN.

(Circuit Court of Appeals, Sixth Circuit. November 9, 1898.)

No. 531.

1. JUDGMENT—CONCLUSIVENESS—MORTGAGEES NOT PARTIES.

A judgment against a railroad company is not binding on its bondholders or mortgage trustees who were not parties thereto, and they may relitigate the plaintiff's right to recover, as well as the amount of recovery, when it is sought to establish such judgment as a lien superior to the mortgage.

2. EASEMENTS—EFFECT OF VACATION OF HIGHWAY ON PRIVATE RIGHT OF WAY.

The action of public authorities in discontinuing a highway cannot affect a private right of way over the land secured to the owner of adjoining property by contract with the owner of the fee.

3. RAILROADS—DESTRUCTION OF MEANS OF ACCESS TO PROPERTY—LIEN FOR DAMAGES.

A direct permanent injury to, or destruction of, a private right of way giving access to property by the construction of a railroad over the same, constitutes a taking of such property for public use to the extent of the actual damage sustained and entitles the owner to a lien for such damage on the proceeds of the railroad when sold on foreclosure superior to

the lien of the mortgage, the right to a lien in such case being the same as though the railroad had acquired its right of way as to such property by contract or condemnation.

Appeal from the Circuit Court of the United States for the District of Kentucky.

On the 1st day of December, 1894, there was pending in the circuit court of the United States for the district of Kentucky the foreclosure suit of the Central Trust Company, trustee, against the Louisville, St. Louis & Texas Railway Company (hereinafter, for convenience, called the "Trust Company" and "Railway Company," respectively). On that day the appellee filed a petition of intervention in that case, based upon a judgment previously recovered in the state circuit court, and affirmed by the superior court of the state of Kentucky, in a suit at law, by the appellee against the Railway Company, to which neither the Central Trust Company nor any holder of bonds was a party. The petitioner sought to have her judgment allowed as a preferential claim, entitled to priority of payment out of the proceeds to arise from a sale of the property of the Railway Company covered by the mortgages which were being foreclosed in the pending suit above referred to. The essential facts assumed in the appellee's statement of her case are these: That she owned a tract or parcel of land of about 4 acres, with a residence and other valuable improvements thereon, in Hancock county, Ky., near the city of Hawesville, which tract of land was bounded on the north by a public highway known as the "State Road," which was there at the time of her purchase of the land. It is claimed that the petitioner's homestead was part of an 80-acre tract of land which belonged originally to one of the Trabue heirs, and that this 80-acre tract was itself a part of a much larger tract,—say, 200 acres,—which belonged to Trabue, presumably the ancestor of the Trabue heirs. This public highway extended along the entire front of the petitioner's lot, and, on account of a large cliff in the rear of her property, with lots on either side owned by other persons, the petitioner's only practical mode of ingress and egress to and from her residence and property was to and from this public highway in front. This road was the highway extending between Hawesville and Cloverport, both on the Ohio river, and appears to have been kept up many years as a public highway. It was finally, however, discontinued as a public highway by order of the Hancock county court; and it is assumed that the fee in the highway, after such discontinuance, reverted to the Trabue heirs,—the petitioner's title extending only to the edge of the highway, and not to the center, as had been adjudged by the courts of Kentucky in the case referred to. In this situation, the Railway Company, by proper proceedings against the Trabue heirs alone, condemned the strip of land previously used as a public highway, as the property of the Trabue heirs, and proceeded to construct its railroad line on the highway, and in front of the appellee's premises, and in doing so made an embankment in front of her premises and lot 5 or 6 feet in height, and 55 or 60 feet from the residence of the appellee. The order of the Hancock county court discontinued only so much of the state road as extended between the town of Hawesville and a place called "Price's Store." Appellee was not a party to the condemnation proceedings. No other highway or road was established by the county court for use in place of the one discontinued. The object of the petitioner's suit in the state court of Kentucky was to recover damages for the injury to her easement or way of ingress and egress to and from her property over said highway so obstructed by this embankment made by the Railway Company. It was sought in that suit to recover, and the appellee did recover, for other elements of damage besides the injury to the right of ingress and egress, but no further reference need be made to such other elements of damage for the purposes of this suit. A transcript of the record of the judgment of the state court and of the evidence adduced in that case was, by consent, used on the hearing of the petition. The contention for the petitioner proceeded upon the ground that the petitioner had, through various conveyances, acquired title from the Trabue heirs, or one of them, in such a mode that, as against the Trabue heirs, she had become vested with a right of way to and from her premises and over

the highway established and in use at the time she purchased, and constituting the north boundary of her lot of land. It is insisted that, when the state road was discontinued as a public highway, such action on the part of the Hancock county court could not affect any contractual right of way vested in the petitioner as against the Trabue heirs, and that the property, being burdened with this right of way in the hands of the Trabue heirs, passed under the condemnation proceedings to the Railway Company subject to the same easement; the petitioner not being a party to that proceeding, and her right in no manner affected thereby. The learned circuit judge treated the judgment in the petitioner's favor in the state court as establishing her easement, and the right to recover for the injury thereto, and the court did not undertake to inquire for itself whether such right existed. In relation to the effect of the judgment of the state court, the circuit judge said: "If we are right in thinking that the bondholders are bound by the adjudication in the state courts, then the contention of the counsel that Mrs. Hennen had no right of ingress or egress after the discontinuance of the state road in front of her lot, and that according to the Kentucky law she had no right to damages for the destruction of the egress and ingress to her property, is not applicable, since it is quite clear that the superior court decided that she had a right of egress and ingress to her property, notwithstanding the discontinuance of the state road, and that she had a right to recover damages for the destruction or impairment thereof; and the case was returned and tried upon that distinct adjudication." The court then proceeds to show that the final decision in the state court was in favor of the right of egress and ingress to petitioner's property, notwithstanding the discontinuance of the state road; and this, of course, established the right to recover, treating that decision as conclusive. The court further observed: "The Trabue heirs, when the fee reverted, if it did revert, held it subject to the easement which had previously arisen over that ground in favor of the various purchasers under them; and this right of egress and ingress—a most valuable one itself—was the one the court decided was in Mrs. Hennen, and had not been taken from her by condemnation proceedings. In that view, she was a proper party to those proceedings, and should have been made a party, if the railroad company desired to divest her of this easement." The amount of the recovery in the state court was \$1,800, and this included other elements of damage besides the injury to the right of way. In undertaking to fix the amount of damages for the injury to the right of ingress and egress, the court below said: "Assuming that \$1,800 covered the entire damage, I think \$1,500 would be a reasonable amount to allow for the destruction or impairment of the ingress and egress. This would be five-sixths ($\frac{5}{6}$) of the judgment, and I think the costs and the damages which have been allowed should be divided in that proportion. A judgment will therefore go in preference over the bondholders as herein indicated." From the judgment entered in accordance with this opinion of the circuit court the present appeal is prosecuted, and errors assigned.

James P. Helm, for appellant.

James P. Gregory, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after stating the case as above, delivered the opinion of the court.

Error is assigned to the action of the court below in holding that the trustees in the mortgage, and bondholders, were bound by the adjudication in the state court establishing the petitioner's right to recover. We are satisfied, from an examination of the record, that the court did so hold. The opinion of the court admits of no other construction, and in this we think there was error. The proposition that a judgment or decree is binding only on parties thereto is

elementary, and there is nothing in the relation between the Railway Company and the trustee in the mortgage, or the bondholders, which creates any exception to this rule, so far as a question of the kind we are now dealing with is concerned. The case cannot be distinguished from *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. 590, in which it was held that bondholders were not bound by the judgment rendered in a suit to which they were not made parties, and this case was followed and applied by this court in *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36, 22 C. C. A. 534, and 76 Fed. 296; *Trust Co. v. Condon*, 31 U. S. App. 419, 14 C. C. A. 314, and 67 Fed. 84; and *Same v. Bridges*, 16 U. S. App. 146, 6 C. C. A. 539, and 57 Fed. 753. It was consequently the duty of the court below to consider and determine for itself the question of the petitioner's right to recover, as well as the amount of such recovery, in case the question of the petitioner's right to recover was decided in her favor. Both questions were raised by the answer to the petition, and should have been examined and determined by the court below independently of the adjudication in the state court. This the court might have done directly, or through the aid of a reference. Assuming, as was done in the contention of the petitioner and in the opinion and judgment of the court, that the appellee became vested with the easement of ingress and egress, as claimed, and that the strip of land condemned as the property of the Trabue heirs was burdened in their hands with such easement, we agree with the circuit court that the land passed by condemnation from the Trabue heirs to the Railway Company, subject to the same easement. It is very clear that the action of the Hancock county court in discontinuing the state road as a public highway could have no effect on any right of way vested in her by contract or otherwise, independently of any action of said county court in establishing or maintaining the road as a public highway. The order of the county court in discontinuing the road as a public highway terminated the right of way of the public generally, which depended on the authority and action of the county court for its existence, and also terminated the obligation on the part of the county to maintain the road in a proper state of repair as a public highway. But the order of the county court did not and could not affect the private right of the petitioner to egress and ingress to her property, if such right existed, and could have been asserted against the Trabue heirs. *Paine's Ex'x v. Storage Co.*, 37 U. S. App. 539, 19 C. C. A. 99, and 71 Fed. 626. The distinction is between a right in the public to use a public highway, depending for its existence on the action of the county court, and a private right of way acquired by grant, contract, or in other valid, legal method, such as by estoppel. But the question of such right, as we have said, was one which it was the duty of the court to consider and determine for itself. This the court did not do, and indeed the precise method in which such an easement was acquired or claimed is left uncertain in this record. The record does suggest the probability that, if the facts were clearly brought out, they would bring the petitioner's case within the doctrine announced in *Paine's Ex'x v. Storage Co.*, supra.

Again, assuming that this right of way or easement was vested in the petitioner as claimed, we concur with the learned circuit judge in the opinion that a direct, permanent injury to, or the destruction of, such right of ingress and egress, would, to the extent of the damage actually sustained, be the taking of private property for public use. *Pumpelly v. Green Bay Co.*, 13 Wall. 166. And the damages sustained by reason of such a taking would constitute a preferential claim on the proceeds arising from the sale of property, entitled to priority of satisfaction as against the bonds secured by the mortgage. Such a claim in this respect could not be, and in the adjudications has not been, distinguished from the ordinary claim to compensation for property taken or condemned for a right of way, or for the purchase price of a right of way conveyed directly to a railroad company, or any part of such purchase price. Whether land for a right of way is acquired by a railroad company by contract, condemnation, or unlawful taking, the owner is equally entitled to just compensation, and the manner of taking or acquisition does not change the nature or priority of the compensation justly due. It was decided by this court in *Trust Co. v. Bridges*, 16 U. S. App. 142, 6 C. C. A. 539, and 57 Fed. 753, that persons who convey a right of way directly to a railroad company are entitled to a lien for the purchase price prior to that of the mortgage bonds of the company.

It is difficult to understand, in view of the record, on what satisfactory basis the court below undertook to apportion the damages included in the judgment of the state court, so as to adjudge what part was for injury to the right of ingress and egress; for, as we have seen, the judgment included other elements of damage. There is, however, no assignment of error on the action of the court in this respect, though the objection is urged in the brief; and our conclusion that the court below must adjudicate for itself the question of right to recover, as well as the amount of such recovery, renders any further discussion of the case unnecessary at this time.

The distinction to which we have referred between the right to use a public highway on the part of the public, arising out of the action of the county court in establishing such a highway, and a private easement acquired by grant or contract, sufficiently shows that the Kentucky cases relied on by counsel for appellant are inapplicable, and comment on those cases is unnecessary. Indeed, the case of *Bradbury v. Walton*, 94 Ky. 163, 21 S. W. 869, relied on by appellant, clearly and elaborately states this distinction, and supports the view we have expressed. The decree of the circuit court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

AMERICAN STEEL & WIRE CO. v. WIRE DRAWERS' & DIE MAKERS'
UNIONS NOS. 1 AND 3 et al.

(Circuit Court, N. D. Ohio, E. D. October 18, 1898.)

1. EQUITY PRACTICE—FORMAL REQUISITES OF DEMURRER.

A demurrer to a bill, which is not in proper form, nor verified by the defendant, nor certified by his counsel, as required by the equity rules, must be disregarded.

2. SAME—PROCEDURE ON DEFECTIVE DEMURRER.

Where a demurrer to a bill is fatally defective under the equity rules, the plaintiff may disregard it, and take a decree pro confesso at the proper time, or may move to strike it from the files.

3. SAME—BILL AGAINST VOLUNTARY ASSOCIATIONS.

Voluntary associations cannot be sued as such, and a bill against such associations by name, which also joins with them as defendants in its caption a large number of individuals, but which contains no allegations showing that such individuals compose, or are members of, such associations, is entirely defective as against the associations.

4. SAME—AMENDMENTS OF PLEADINGS.

Under the federal statute of amendments (Rev. St. § 954), and the equity rules regulating the practice on amendments, a bill may be amended on the hearing of an application for a preliminary injunction by supplying allegations necessary to show that individual defendants on whom notice of the application has been served are officers and members of a voluntary association sought to be bound by the injunction, and the amendment becomes effective at once for the purposes of the hearing, which, unless new parties are made necessary thereto, or other considerations require it, need not be postponed to await the issuance, service, and return of new process, as it does not proceed upon the process of subpoena, but upon the notice prescribed.

5. INJUNCTIONS—RESTRAINING ACTION BY VOLUNTARY ASSOCIATION.

An injunction to restrain action by a voluntary association need not be directed against such association by name, an injunction against members as individuals being effective to restrain illegal action by them in their associated capacity, which effects all the practical relief possible by injunction in such cases.

6. SAME—HEARING ON APPLICATION FOR PRELIMINARY INJUNCTION—DISCHARGE OF DEFENDANTS.

On the hearing of an application for a preliminary injunction against a large number of defendants, a showing that certain defendants have not been served, that no showing is made against others, or that for other reasons they would be entitled to discharge on final hearing, is immaterial, as such defendants may be served or connected with the alleged unlawful acts on final hearing, and cannot be dismissed from the record at such stage of the proceedings; and it is one of the features of an interlocutory injunction that it reaches all who are parties, whether they have been served with process or not, and binds all who have notice of it, whether parties or not. Nor is such a hearing changed in character to that of a final hearing, and the showing rendered material to discharge such defendants, by the fact that the action sought to be enjoined was taken by defendants in the conduct of a strike against employers, on the ground that a preliminary injunction, if granted, will end the strike, as such result can only follow by the voluntary action of the defendants in electing to abandon the strike, because they are not permitted to conduct it by means which the court pronounces unlawful.

7. SAME—EFFECT ON ABSENT PARTIES—EQUITY RULES.

The effect of the reservation in equity rule 48, permitting a few individuals to sue or be sued as representing a numerous class, by which it is provided that "the decree shall be without prejudice to the rights and claims of all absent parties," is only to prevent such decree from concluding such parties, and to preserve their right to relitigate the same questions, and

does not prevent their being subsequently brought in and bound by the decree after a hearing, nor permit them to disregard an injunction of which they have notice.

8. PARTIES—SUIT AGAINST DEFENDANTS AS REPRESENTATIVES OF A CLASS.

Under the equity rules permitting a few individuals to sue or be sued as representatives of a class, it is always a question to be determined on the particular facts in each case whether the parties to the record, as such representatives, fairly represent the interest or right involved. In the case of defendants no official or other authority is necessary, and the leaders of an organized strike may be sued as fairly representing the organization, without regard to their official connection with it.

This is a suit in equity by the American Steel & Wire Company against the Wire Drawers' & Die Makers' Unions Nos. 1 and 3, Walter Gillette, and others. Heard on an application to vacate service, on demurrer to the bill, and on application to amend the bill.

Squire, Sanders & Dempsey, for complainant.

Arnold Green and M. A. Foran, for defendants.

HAMMOND, J. There is a motion by Fred Walker, one of defendants, to vacate the service of subpoena upon him as the president and chief officer of the Wire Drawers' & Die Makers' Union No. 3, and to dismiss the bill as to that union, and also as to the Wire Drawers' & Die Makers' Union No. 1, and to strike their names from the record, for the reason that there is no law or precedent for suing a voluntary association by its name, or for obtaining jurisdiction over it by service of a summons on one of its officers. There is also a demurrer by the same Fred Walker, "for the reason that the facts stated in said bill of complaint do not constitute a cause of action against said defendants." The title in the caption of this demurrer is as follows: "The American Steel & Wire Company, Complainant, vs. Wire Drawers' & Die Makers' Union No. 1, of Cleveland, Ohio, Defendants." This pleading probably follows the form used under the state code of practice, which is wholly inapplicable here, and it is altogether inartificial, according to our equity rules and practice. If it were in proper form, not being verified by defendant, nor certified by counsel, as required by equity rule 31, it must be wholly disregarded, if it be permissible at this stage of the proceeding, and on this application for a preliminary injunction, to hear it at all. *National Bank v. Insurance Co.*, 104 U. S. 54, 76; *Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936; *Secor v. Singleton*, 9 Fed. 809. It has not been set down for hearing by the plaintiff according to equity rule 33; and the defendant's remedy, on failure of the plaintiff to so set the demurrer for argument, is regulated by rule 38. Or, for the fatal defect above pointed out, the plaintiff may disregard it, and take a pro confesso, at the proper time, under equity rules 18 and 19; or move to strike it from the files. *Goodyear v. Toby*, 6 Blatchf. 130, Fed. Cas. No. 5,585, and the cases last above cited. Hence, any disposition of this demurrer now would be premature, and I only refer to it because it is presented by counsel as having a bearing upon the application for a preliminary injunction. If it suggested an entire

absence of jurisdiction over the parties or the subject-matter, the duty of the court would be to consider that suggestion, no matter how defective it may be as a pleading; but it is not that kind of a demurrer. It has been considered, however, in connection with and as a part of the motion to vacate the service. The demurrer, seemingly, is intended as a general demurrer for all the "defendants," though it is in terms only the demurrer of one of them, Fred Walker, namely; or else, taken with its caption, it is intended to be the demurrer of Wire Drawers' Union No. 1. Now, by the motion filed it appears from its recitals that this defendant Walker is the president of Wire Drawers' Union No. 3, not No. 1, mentioned in the demurrer; and yet in the motion he also assumes to represent Union No. 1, as well as Union No. 3, and it may be that he assumes by the demurrer to represent all the defendants, the two unions as well as all the rest. The truth is, there is too much generality and want of precision of statement in all the pleadings, the irregularities being quite embarrassing to the disposition of the present motion to vacate the service.

The bill is unquestionably defective, and there is an application to amend it, which should be considered along with this motion. While alleging that they are "voluntary associations," the bill sues the two unions as if they were suable entities, as corporations are, and the subpoena issues against them as such. There is not an averment in the bill which undertakes to reach them otherwise than by this general suit against them. It is too plain for any argument that they cannot be so sued. The right to sue and be sued is a corporate franchise, must be granted by legislation, and voluntary associations only possess it under the circumstances mentioned in *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566. This bill does not, by its allegations, connect any of the defendants with these unions, unless the caption, which is equivocal in this regard, may be taken to aver that all the defendants named therein are members of them. If so, no distinction is made between the two, showing which of the defendants are members of the one and which of the other. The punctuation of the caption, however, would indicate that the defendants are sued individually, and not as members of the unions. It reads thus: "The American Steel & Wire Company, Complainant, vs. Wire Drawers' and Die Makers' Union No. 1, of Cleveland, Ohio, and Wire Drawers' Union No. 3, of Cleveland, Ohio, of the Federated Wire Trades of America; the respective members of said unions; Walter Gillette; E. A. Cliff; F. Marquardt; and many others, similarly named, to the number of 86—Defendants." This would seem to indicate that the two unions were sued respectively, then "the respective members of said unions" in solido, and then the individuals named as individuals, and not as members or representatives of the unions. The allegations of the bill do not help this in any way. The individuals are not averred to be officers or members of the unions, or to have any connection with them, except in the eighth paragraph it is related that "certain committees [of which the defendant Gillette was a member] from said unions have called upon the officers and agents of your

orator for the avowed purpose of demanding a recognition of a certain scale provided and dictated by said Gillette and his associates, in connection with and through the medium of said unions." This is all there is of it. Even the conspiracy paragraph No. 13 of the bill only avers that "said defendants are conspiring together for the unlawful purpose," etc., and does not at all advise us of the particulars of the conspiracy in relation to the representative attitude of any of the defendants. So that the bill is entirely defective as a suit against voluntary associations.

The subpoena and rule to show cause follow the identical words of the caption, and command the appearance of the defendants in those words. The return No. 2 of the marshal states that he served the process on "Wire Drawers' Union No. 1 by delivering a copy of the bill to R. Heiden, treasurer of said union, the president of said union not found in my district"; and his return No. 1 states that he served the process on "Wire Drawers' Union No. 3 by delivering a copy to Aug. Maltois, vice president of said union, the president of said union not found in my district." Both of these officials are named as defendants, but neither in his official capacity, and there is no allegation of the bill connecting them with the unions. The amendment that is asked cures this defect of substantial and specific allegation very thoroughly, but counsel of the defendants object to its being filed now, and insist that the proof shows that Gillette is not the president of this union No. 1, but only a member of the executive committee of the Federated Wire Trade, another and distinct organization, not sued by this bill. But, however that may be, the amendment avers that Gillette is president of the Union No. 1 and Walker of Union No. 3, and now specifically states that Cliff, Marquardt, Haak, Heiden, and about 40 others named in the amendment are members of these voluntary associations, and asks that Gillette and Walker, the respective presidents, and the named members, be made parties "as representing said two voluntary associations and its membership, as fully as if each member thereof were made a party defendant hereto." It also avers that the membership is numerous, that all of them are not known to the plaintiffs, and that it is impracticable to make them all parties to this bill. Counsel for defendants say, in their brief, that some 10 persons named in this amendment are not members of these unions. That would seem quite immaterial when there are 30 members left to represent the whole; but, technically, we cannot try that question now, and in this manner, and only on a proper plea in abatement, which is a sufficient answer to the suggestion, as also it is to that about Gillette not being the president of Union No. 1.

It is also objected that the amendment cannot now properly be made to serve the purposes of this application for injunction, but that it must take the regular course, by having process issued, notice served, and a new application for injunction made in that behalf. As I have repeatedly said in many judicial judgments, the federal statute of amendments is the most liberal and imperative since the ancient and beneficent statute of jeofails. Rev. St. § 954. It commands that the court "may at any time permit either of the

parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe." This applies to defects appearing on an application for preliminary injunction as well as to any other hearing, both in its letter and the spirit of liberality indicated by this and the other provisions of the statute. The court may use its discretion as to the conditions imposed, and prescribe rules to that end; but I doubt if it may ever refuse to receive an amendment, and thereby annul the statute, which permits the parties to amend "at any time" upon compliance with such conditions as the rules prescribe. Following both the letter and spirit of the statute, which is old as the courts themselves, our equity rules regulate the practice of amendments with great particularity, and this application is fully within them. Equity Rules 28, 29, 45, 46. So it is in accordance with the general equity practice to allow the bill to be amended on the hearing of interlocutory applications. 1 Daniell, Ch. Prac. 492.

As to the suggested necessity for process before the amendment can be effective, that objection overlooks the fact that we are not proceeding on this application for a preliminary injunction upon the process of subpoena, but upon the notice prescribed in the rules ordered by the circuit judge, and especially designed for this hearing. The subpoenas issued are not returnable until the first Monday in November next, while this rule to show cause against an injunction pendente lite is returnable now, and the process demanded by this objection may be hereafter had in due time, according to the equity rules, for all other purposes. Meantime, however, as already shown, the amendment, if allowed to be filed, must stand good for the present purpose, and becomes as effective as the original bill on the hearing of the application for preliminary injunction. It would be, however, proper practice to postpone this hearing for a further notice or another rule to show cause against the amended bill, if the circumstances required it. If altogether new parties are to be made, having no notice of this hearing, postponement would be essential; but such is not the fact, in the substantial particulars. The notice already given to parties on the record has been sufficient to bring the unions here, and we are now dealing with their motion to be dismissed. Being here for that purpose, they are available for all the purposes of this interlocutory application for an injunction, one of which is to receive and submit to any amendment of the bill that may be granted in aid of the application. Other circumstances might require that the hearing should be postponed to admit the parties for some defense against the amendment not now open upon this interlocutory hearing; but they do not exist. Most of these defendants, and especially the chief officers, if not all, who are named in the proposed amendment to the bill, have been here defending against the claim for an injunction, and the facts relating to the share their unions have taken in the strike have been put in evidence as fully as they desired to present them, or as they would be at any delayed hearing, and quite as fully as is at all necessary for any defense they could properly make against an interlocutory injunction. Indeed, I am not sure but

that the amendment is quite unnecessary, for the preliminary purpose of an application for an injunction *pendente lite*, notwithstanding the grave defects of the bill as one against voluntary associations. They need not be enjoined *eo nomine*, or *in solido*, qua associations, for an injunction against numerous members in their individual capacity would operate to restrain them from any unlawful action in their associated capacity as well, and that is practically about all the relief that is possible by way of injunction against associations, even when they are incorporated. It is rather a barren ideality to enjoin an artificial entity, and, after all, the process operates, and punishment by contempt proceedings secures obedience, mostly through the individuals who compose or represent it; and in that view, without the amendment, there are probably enough of the members in court for all the practical purposes of the plaintiff's case. Therefore these numerous objections might be of little practical value, if sustained, so far as relates to this interlocutory application. But I have treated them with that careful consideration which the industrious ingenuity of counsel deserves.

And I may as well now dispose of another objection pertinent here, as well as to the general defense, though it has not been presented as an objection to the application for leave to amend the bill as proposed. Counsel has prepared elaborate and useful schedules of this small army of defendants, showing those who have answered, those who have been served and not answered, those who are out of the jurisdiction as shown by the proof, those who have not been served at all, and about whom nothing is shown, those against whom there is no evidence in the affidavits filed, those "who have been seen once only in the vicinity," and those who have been seen "more than once." By this process of cancellation and elimination we have a showing that only 13—a corporal's guard, comparatively—are up for "government by injunction." All this would be very well if this case were on final hearing, and the question were one of perpetual injunction. Then such elimination would be necessary on the plainest principles of equitable remedy and practice. But not so now. It is premature labor and consideration, for none of the parties can be now dismissed from the record, nor should the preliminary injunction be withheld for any of the reasons suggested by the schedules, as will presently be shown. Nor do I overlook the forcible argument and suggestion of counsel that practically, in a case like this, a preliminary injunction ends the strike. If you "break the strike" by a preliminary injunction, it is urged, there is nothing more to litigate about. This may be true if the strike be then wholly abandoned, but otherwise it is not true, and its chief force is in the grave duty imposed on the court of careful consideration to see that no preliminary or other injunction issues, unless according to the law and right of the case. That responsibility is not oppressive in its weight, as it should not be, for the reason that no court can or should shirk it, whatever others may be allowed to do in other branches of governmental action, but is always felt alike in all cases as a potential inducement to careful judgment, whether at

the final hearing or on interlocutory application. Yet a court is not "a strike breaker," as one of the affiants has been denominated, and is not engaged in that business, as such, whether it be a state or federal court, and its duties are not properly to be administered on any such suggestion. If that should be the effect of a preliminary injunction, or of a final decree, for that matter, it is only because the defendants voluntarily will have it so, and prefer to abandon all rightful action in maintaining their organized strike, because they cannot act wrongfully, or, at least, cannot do those things which are pronounced wrongful by the courts. But for that abandonment the courts are in no wise responsible; nor should that fact influence its judgment. What is really the outcome of the argument, in its logical effect, is that, if strikers cannot decide for themselves what is right and what is wrong, they must abandon the strike. But it is apparent, on a moment's reflection, that no class of the community has, can have, or should have that power. Strikers would be, indeed, a favored class if it were conceded to them. And, happily, they do not ask it, but yield cheerful and ready obedience to the law as declared by the courts. Mr. Justice Brewer, in the Debs Case, 158 U. S. 564, 598, 15 Sup. Ct. 900, replying to a somewhat similar suggestion found in the proof,—“that it was simply the United States courts that ended the strike,”—commends the action of the strikers, “who unhesitatingly yielded when the question of right or wrong was submitted to the courts, and by them decided upon the settled conviction of all citizens that to those tribunals is committed the determination of right and wrong between individuals, masses, and states.” But the court here was commending the giving up of that which was by the legal decree declared wrongful, and not suggesting that peaceable and lawful action in maintaining a strike must be abandoned. Therefore it is an answer to the suggestion that this hearing is, in effect, the same as a final hearing, because of such a result, that it is not a necessary legal consequence of an interlocutory decree, or even of a final decree for a perpetual injunction. Under neither would the defendants be required to abandon a lawfully conducted strike, and, if they did, it would be voluntary, and a confession that only by lawlessness can a strike be successfully maintained. The case, therefore, on this application, must be conducted as an interlocutory proceeding, and not a final hearing, as in all other cases. And it is one of the features of an interlocutory injunction that it reaches all who are parties, whether they have been served with process of subpoena or not, whether they have appeared or not, whether they have answered or not; and it binds all who have notice of it, whether they are parties or not. It is old as the practice of injunctions that all having notice of it must obey it. If not parties to the suit, they aid or abet those who are, if the injunction be violated by those who know of it. Hence we are not, in an interlocutory proceeding, required to scrutinize, as on a final hearing, the service of process. It is always time enough when one violating an injunction is ruled for a breach of it to inquire whether there has been binding notice on him or not. Equity Rule 10; 2 Daniell, Ch. Prac. 1061, 1673, 1683, et seq. If a breach has been committed by

a person who was not named in the writ or order, the motion must be that he may be committed for his contempt in knowingly assisting in the breach. *Ex parte Lennon*, 166 U. S. 548, 554, 17 Sup. Ct. 658; *Id.*, 12 C. C. A. 134, 64 Fed. 320, 323; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 746, 750; 2 *Daniell*, Ch. Prac. (5th Ed.) 1685, citing *Wellesley v. Mornington*, 11 Beav. 180, 181; *Seaward v. Paterson* [1897] 1 Ch. 545, cited by Judge Clark in the note to *Railroad Co. v. McConnell*, 82 Fed. 65, 88. If the ruling of Judge Foster, so much urged by counsel for defendants, in *Oxley Stave Co. v. Cooper's International Union*, 72 Fed. 695, 697, can be taken to mean that an injunction cannot bind persons not formally parties to the bill, and served with notice of process, under any circumstances, it is contrary to the foregoing decisions; but if, however, it only means that the writ will not issue directly against any persons not named and formally made parties to the bill, it is not adverse to the general practice on the subject. It is only intended, perhaps, by the learned judge, to assert the force of the reservation contained in equity rule 48, which regulates our practice on this subject, and which has always been understood to modify somewhat the general doctrine in England that parties not formally named as such in the bill, or formally served with process, may yet be bound on the principle of representation to the fullest extent that those are bound who are their representatives in the suit. The language of the reservation is that in such cases "the decree shall be without prejudice to the rights and claims of all absent parties." The rule especially is framed to allow a suit to proceed without making all the members of an association or of a class of defendants formal parties; but, while preserving the right of the absent ones to afterwards litigate for themselves the same question, it does not prohibit the whole class, when plaintiffs, from taking the benefit of a decree in favor of those who represent them; nor preclude a plaintiff, who has sued the whole class by their representatives, from binding the absent parties by supplemental proceedings to bring them in, when known, if necessary, and subject them to the decree, when they have had that opportunity to defend against it. In cases like this, of injunction, against large bodies or masses of alleged trespassers upon the rights of the plaintiff, the ordinary practice of granting leave to make new parties by supplemental process, as occasion may require, affords adequate redress for the plaintiff against any who are trespassing, in fact, as active agents in the alleged wrongdoing; and by taking care that all persons at large who menace his rights shall have particular notice of the injunction, if any one or more engage in the forbidden acts after such notice, proceedings may be had for aiding and abetting in the breach which was forbidden to the defendants. To this effect are all the authorities above cited. The equity rule, in my judgment, was not intended to affect this practice by its reservation; nor does Judge Foster, in the case cited, intend to assert that absent members of an association are not to be affected by an injunction against those of their associates who are formal parties to the record, so that they must be dismissed, as in that case, before final decree, when not served as a matter of neces-

sity. Whether parties not served are to be bound by any injunction which may be ordered is not a question arising now, but will arise if any proceedings should be taken to bind them hereafter, or charge them with a breach. The application to dismiss the bill as to them should not be granted, for the plain reason that the plaintiff may yet serve them with subpoena, or otherwise notify them, and seek to extend the injunction formally as to them, or have them in the record at the final hearing.

We come now to the further objection to this amendment that it does not yet contain the specific allegations necessary in a bill to charge a few persons as the representatives of the many. Equity rule 48, allowing parties to be left out of the bill where they are too numerous, has already been referred to, but it should be read along with the series of rules beginning with rule 47 and extending to and including rule 54, from which it will be seen that the practice is carefully designed to regulate such suits according to the kind of classes which are sued, ordinarily; but there is not any specific provision for suits against unincorporated or voluntary associations. And there does not seem to be any uniform practice in the method of suing such societies. All that can be said is that, technically, it is a suit against the members individually, and not in solido against the company, as in the case of incorporated societies. The chief officers, for purposes of suits, represent a corporation, generally, and they may so represent a voluntary association; but there is no technical requirement that process shall be served on them exclusively or generally, though by a natural analogy that would be a convenient method to adopt in suing a voluntary association or in bringing a suit for it. But the association may, and often does, appoint or select its own agencies for bringing its suits, formally or informally, by a selection of such as, for the occasion, it chooses to adopt. In suits against it the plaintiff is left to get along as best he can by aid of the rule allowing a few of the mass to be selected as representatives, and by aid of the court in ordering that the proceedings shall be conducted according to the particular circumstances and the particular nature or purpose of each suit, all absent parties not actually served with process being protected by the modification contained in the reservation of equity rule 48, already commented on, so far as the courts of the United States are concerned. *Mandeville v. Riggs*, 2 Pet. 482; *Beatty v. Kurtz*, Id. 566, 584; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, 570, 574, 575; *Smith v. Swormstedt*, 16 How. 288, 302; *Ayres v. Carver*, 17 How. 591; *McArthur v. Scott*, 113 U. S. 340, 395, 5 Sup. Ct. 652; *U. S. v. Old Settlers*, 148 U. S. 427, 480, 13 Sup. Ct. 650; *Hotel Co. v. Wade*, 97 U. S. 13, 21; *Payne v. Hook*, 7 Wall. 425, 431; *West v. Randall*, 2 Mason, 181, Fed. Cas. No. 17,424 (volume 29, p. 722); *U. S. v. Elliott*, 64 Fed. 27, 35; *Oxley Stave Co. v. Coopers' International Union*, 72 Fed. 695, 697; *Railroad v. McConnell*, 82 Fed. 65, 88; *Fost. Fed. Prac.* §§ 45, 47, 48, 108; *Beach, Mod. Eq. Prac.* §§ 65, 66; 1 *Daniell, Ch. Prac.* (5th Ed.) 272. The case of *West v. Randall*, *supra*, is a very full exposition of the practice by Mr. Justice Story, who refers to voluntary associations among the

enumerated instances where the court is satisfied with bringing so many before it as may be considered as fairly representing the right, and, honestly contesting for the whole, may therefore bind, in a sense, that right, but will permit such parties as are absent, on a rehearing or otherwise, to be heard more distinctly by the court, if desired. Of course, as he says, the principle always supposes that the decree can fitly be made, as between the parties before the court, without substantial injury to third persons. It is said in *Smith v. Swormstedt*, *supra*, that care must be taken that the persons brought on the record fairly represent the interest or right involved, so that it may be fully and honestly tried; which is approvingly repeated by Mr. Chief Justice Fuller in *U. S. v. Old Settlers*, *supra*. Again, in *McArthur v. Scott*, *supra*, Mr. Justice Gray remarks that, "where a suit is by or against a few individuals as representing a numerous class, that fact must be alleged of record, so as to present to the court the question whether sufficient parties are before it to properly represent the rights of all." And, finally, *Ayres v. Carver*, *supra*, furnishes an instructive illustration of the case where the parties, no matter how numerous, cannot find representation by a few, and where this practice is not applicable.

The proposed amendment fully conforms to the practice as displayed in the foregoing cases. From the very nature of the case, there are sufficient of the members of the unions to defend this suit, and enough to answer all practical purposes of the orders and decrees that may be asked against them. The fact of numerous membership and the necessity for proceeding against a few are stated, and the court can see that those mentioned fairly represent the whole. The fallacy of the objection made is in supposing that the required "representative" capacity resides in some official or authorized representative quality, attaching by reason of the action of the union itself in conferring it. As plaintiffs that might be required, as a reading of the above cases will show, but as defendants it is not. It depends on the facts in each case, and the court will regulate that matter by its decree, according to circumstances, and will insist that those brought in shall fairly represent the whole, according to the nature of the relief sought and the peculiarities of the association. In a case of an organized strike of laborers it is fair enough if the leaders of the strike be brought in to represent the organization, no matter what their official relation to their society may be. The result is that the motion to vacate the service of the process and rule to show cause against the two unions, which was reserved at the hearing, must be denied, and the plaintiffs have leave to file their amendment, after it has been properly verified by oath. The demurrer will stand over for future proceedings, according to the rules of practice in that behalf. Ordered accordingly.

**AMERICAN STEEL & WIRE CO. v. WIRE DRAWERS' & DIE MAKERS'
UNIONS NOS. 1 AND 3 et al.¹**

(Circuit Court, N. D. Ohio, E. D. October 18, 1898.)

No. 5,812.

1. **INJUNCTION—RIGHT TO USE OF STREETS—OBSTRUCTING ACCESS TO PREMISES.**
The owner of a house, whether a dwelling, store, or mill, has a distinct right of property in the streets and highways adjacent and used as approaches to it; and a use of such streets or highways by others for the purpose of forcibly preventing access to such house is an unlawful interference with such right, and constitutes a private nuisance, which may be abated by injunction.
2. **SAME—SUIT BY CORPORATION—DEFENSE OF UNLAWFUL TRUST.**
A claim that a corporation is a trust and illegal cannot be made collaterally as a defense to a suit by the corporation to enforce a private right by injunction.
3. **SAME—STRIKES—INTERFERENCE WITH RIGHT OF PROPERTY AND CONTRACT.**
Defendants, who had formerly been employes of plaintiff, in its mills, as wire drawers, but who had gone out on a strike, for more than two months had patrolled the streets adjacent to plaintiff's works both day and night, keeping within call at all times a large body of men, for the claimed purpose of dissuading other workmen from taking employment in their places. The evidence showed but a single instance during that time in which defendants stood aside and permitted a wire drawer to enter the mill, and that instance was disputed, although in a number of instances workmen attempted unsuccessfully to enter, and several conflicts occurred between them and the strikers. *Held*, that such action was an unlawful interference by defendants with plaintiff's rights of property and freedom to contract, which entitled plaintiff to relief by injunction.
4. **SAME—UNLAWFUL FORCE AND VIOLENCE.**
It is not necessary that actual batteries or assaults shall be committed, to constitute unlawful force or violence which will afford ground for relief by injunction; but a display of force sufficient to deter others from attempting to exercise a lawful right, and intended to accomplish that purpose, is sufficient.

On Application for Injunction.

The proof in this case establishes that the former operatives of the plaintiff's mill have organized a strike to secure an advance of wages to a scale that they have endeavored to induce the plaintiff to accept before they will work for it. The strike has been conducted under the leadership of Walter Gillette and others, made parties to the bill. He was not one of the striking operatives, but a member of one of the unions, and an official of the executive council of the federation to which the unions belong. He instigated the movement, and substantially organized it.

It is not necessary to consider the causes for the strike, its scope or object, for it must be conceded that the men had a right to strike, no matter for what cause, good or bad; nor to consider whether it was a wise or judicious movement or not. That matter does not concern the proceedings before the court, but only the men themselves, and therefore all the affidavits upon that subject are quite irrelevant. The striking operatives had no fixed contract for their labor; nor did those who remained, nor did those who desired to enter the mill to work for the plaintiff, have such contracts. All were working, or proposed to work, for daily or weekly wages, and might quit or work at will, and might be so discharged. The two Wire Drawers' Unions made defendants are not shown to have been otherwise engaged than by lending their

¹In the case of *Lyons v. Wilkins*, the English court of appeal rendered, on December 20, 1898, a decision which is directly in line with the decision of Judge Hammond. It was held that an injunction would be granted to restrain persons from watching or besetting the works or place of business of an employer, or person working for him, for the purpose of persuading or otherwise preventing persons from working for him, or for any other purpose, except merely to obtain or communicate information.—[Ed.]

sanction and co-operation to the larger movement, embracing many operatives who were not members of the union. The plan adopted was to organize for the movement the whole body of wire drawers employed in the mill, unionists and nonunionists, by assembling them in mass meeting. The strike having been set on foot by such a meeting, it was continued by holding almost daily a mass meeting at a certain hall near by, which meetings have continued from the beginning of the strike, about the 1st of August last, until the present time. The proof does not disclose with any detail the organized plan of campaign adopted by these meetings, but it does appear that Gillette and the other leaders, one or more, were always on hand, as leaders, if occasion required; and the important feature of their plan was to patrol or picket the plaintiff's mill, not at any time by going on the premises, but around and near to them, and especially on all the streets and other approaches to them, more or less remote, but always near enough to intercept all wire drawers going to the mill to engage in work; and this picket or patrol was kept up day and night, continuously, but not always to the same extent, either as to their location, the number on duty, or the vigilance employed. The plaintiffs contend, and their affidavits tend to prove it, that the purpose of this patrol was to forcibly prevent, if force were necessary, all persons willing to go to work in the mill from entering it for that purpose; while the defendants contend, and their affidavits tend to prove it, that the only purpose was to meet these men, and "by argument and persuasion induce them not to take the strikers' jobs, but to join the strikers, by abstention from work, at least, until all could go to work on the advanced scale proposed by the strikers." Mostly, the affidavits only express the opinions of the affiants that the conduct complained of by the plaintiff's affidavits amounted only to "argument" or "persuasion." They do establish, undoubtedly, that the strikers did intend to use peaceful argument in furtherance of their desire to prevent the outsiders from going to work in the mill; and they deny that any violence was used, except such as was provoked by aggressive action on the part of the "strike breakers,"—words which will be borrowed from the mouths of the defendants and their counsel, and used here to designate all who insisted on going into the mill to work. And it is the belief of the defending affiants that this aggression by the strike breakers was instigated and organized by the plaintiff for the purpose of breaking the strike by violence, or to bring about a condition which would justify this application for an injunction, and that it was the preliminary fabrication of evidence to that end. It is not denied that conflict, turbulence, and violence have occurred on several occasions in the streets near the mill, especially on August 28th, September 5th, 12th, 19th, 20th, and 21st, and October 5th and 6th; but the affiants for defendants swear that in every instance this was provoked by the strike breakers, and not brought on by the strikers. The affidavits of the plaintiff put the blame on the strikers. The most formidable of these conflicts was that of September 19th, which had some special features, but otherwise may be taken as in some degree representing the others, so far, at least, as it indicates the defendants' plan for maintaining their strike, and confessedly is the one wherein the aggression of the plaintiff's strike breakers most decidedly appears, and most opprobriously, in the view of the defendants and their counsel.

There is in the city of Cleveland a settlement of Poles, called the "Polack Settlement," wherein resides a Catholic priest, now out of harmony with his former church, said by defendants to have been excommunicated; but this is denied by him. There also resides there one Paulowski, seemingly a very determined and belligerent person. The priest has an independent congregation of his own, and it is testified that about 40 of them are wire drawers formerly employed in the plaintiff's mill; there are also in the congregation or settlement other wire drawers,—among them, Paulowski,—who had worked for plaintiff, but were not so employed at the time or immediately before the strike. Paulowski is denounced by the defendants' affidavits and by their counsel as a "professional strike breaker"; that is, one who for hire will head a gang of men proposing to work, and lead them in assaults upon the strikers to clear the way to the factories, or a gang of "toughs" pretending to want work,—it being immaterial to this soldier of fortune, so he be paid for the enterprise. The proof does not substantiate this character for the man. He denies it, and swears that he really wished to go to work,

taking advantage of this opening, as did his neighbors and companions, who needed the wages to be earned. He made several other attempts to reach the mill, and with much smaller groups than were engaged in the events of the 19th of September. The chief manager of the plaintiff company, some of the superintendents and foremen, visited this settlement, had conferences with the priest, Paulowski, and others, with the general result, not denied, that an arrangement was made whereby the priest advised his parishioners to avail themselves of the offered opportunity to go to work in this wire mill. Some 50 of them addressed a petition to the mayor, announcing the desire to go to work, asserting their need of the wages, and asking for police protection in reaching the mill against the anticipated obstruction of the streets by the strikers. The priest and others with him also called on the superintendent of police, showed him the petition and affidavits of assaults that had been made, and requested police protection. The superintendent told them that he got his orders from the mayor, and advised that he be seen. They presented the petition and affidavits to the mayor, who told them he would look the matter over, and see that the protection should be there. They then advised him that they would make an attempt to go to work on the following Monday, the 19th. On that morning about 15 of the Polacks, in company with Paulowski, attempted to go to the mill, but were met as they approached on the streets by a body of strikers, assembled by signals or preconcerted arrangement, variously estimated at 50, 70, and 100, or more. A fight ensued. There was only one policeman present, on the regular beat, though there is proof that three others were there in citizens' clothes, which is, however, denied, and the fact is not clearly established. The respective affidavits seek to blame the other side for beginning this combat. One of the strike breakers, who was an employé trying to go to his work, was arrested, but there was no other arrest. The strikers prevailed, and the Polacks did not reach the mill. Immediately after this disturbance one of the attorneys and the manager of the plaintiff's company called on the mayor, and again demanded police protection. They subsequently addressed to him a letter, advising him of the situation, and informed him that on the next day another attempt would be made by a body of men seeking employment, and again demanded proper police protection. To this the mayor made a somewhat diplomatic reply, denying that there was any occasion for police interference, suggesting that a meeting be had between the parties to adjust the difficulties, and expressing his belief that, if the plaintiff were willing to do "the right thing," the whole question might be easily settled. On the next day, September 21st, a similar body of men, under the leadership of Baackes, the general manager, and Ney, the superintendent, of plaintiff's mill, attempted to reach the mill, and were again obstructed by a large body of strikers, quite 200 strong, under one Russ, as their leader, whereupon "a scuffle ensued," and the strikers again succeeded in preventing the men from going to work. The plaintiff's affidavits complain of the perfunctory and inefficient action of the single policeman on his regular beat to help them through, but it is explained on the other side that he did all that the occasion demanded, as there was no violent fighting, requiring arrests. The minor disturbances, taken together with these and the other proof, show that the plan of operations constantly employed by the strikers was to meet every body of wire drawers, every group, or any single man, with their pickets or patrols, and if necessary with a larger body, always available by signal or otherwise from the large number of strikers assembled at convenient places adjacent, and thus to argue with and persuade them, according to their story, or to obstruct and force them away from the mill, according to the story of the plaintiff; and that this has been kept up since the strike was inaugurated, for more than two months. Except a disputed occurrence with one Willman, described in Cliff's affidavit, introduced as counter to that of Willman, there is no instance authenticated by affidavit of any strike breaker or other wire drawer being let into the mill by the strikers' standing aside and allowing him to enter for the purpose of going to work after the argument or pleading with him had failed. This was not a general strike of all the operatives in the mill, but only of those in the wire-drawing department; and those not in that department, or wishing to work elsewhere in the mill, came to and went from the mill without interruption of any kind. This statement requires modification, to the extent that Gillette, and perhaps others, testify that

within the last week preceding the hearing of this application there had been some relaxation of vigilance, and some wire drawers have gone into the mill to work without any attempt to dissuade them. It is in proof that the plaintiffs have maintained inside the mill some 50, more or less, of workmen, who eat and lodge there, for fear, as they swear, of bodily injury, or successful resistance to their re-entry, if they go out. Again, the affidavits of defense assert that this is unnecessary, and only a scheme of plaintiffs to fabricate a condition favorable as evidence to this application for an injunction. It is also shown by the proof that, by stealth of one kind and another, workmen enter the mill, either by evading the pickets, or sometimes by circumventing them after an attempted obstruction, as in the case of those who swear that after being driven away they reached an entrance in a closed carriage. If it can be at all material for any purpose, it may be stated here that, when the strike commenced, of the 230 wire operatives there were 121 Germans, 42 Poles, 19 Americans, 10 Swedes, 9 Irishmen, 4 Englishmen, 3 Bohemians, 3 Armenians, 2 Hungarians, 1 French-American, 1 English-American, 1 Irish-American, and 1 Russian. Since the movement commenced there have been and are employed 25 Germans, 28 Poles, 5 Turks, 2 Englishmen, 13 Armenians, 2 Welshmen, and 2 Bohemians,—a total of 77. It appears that the plaintiffs persistently have refused to recognize the unions, their officers or committees, in conference or otherwise, to discuss the scale of wages tendered on either side, but have expressed a willingness to confer with the men themselves on that subject.

The police officers testify, as do other witnesses cross-examined, that this is the "most orderly strike" ever known to Cleveland, though plaintiff's witnesses disagree about that. These officers, also including the sheriff and the mayor, by affidavit and orally, swear that they are, and ever have been, ready, willing, and able to perform their duties, respectively, in preserving and protecting the public peace and rights of property. The sheriff says that no application has ever been made to him by the plaintiff, nor has he been notified of any breach, or threatened breach, of the peace. The mayor says that he has fully investigated the complaints made to him, and is thoroughly satisfied that there was never any occasion for his interference; that there existed no case of riot or like emergency; that there was no body of men around, or in the vicinity, acting together with intent to commit a felony, or to offer violence to any person or property, or by force and violence to break or resist the laws of the state; that there was never any reasonable apprehension that any breaches of the peace would be committed by the former employes of the plaintiff; and that in his belief a force of police was wanted by the plaintiff to intimidate "persons rightfully upon the street," and who were committing no breach of the peace, or intending to do so. It is also in proof that the mayor told the plaintiffs when they applied to him that "they should apply for an injunction." The two chief officers of the police testified orally that there never has been a condition which should deter a "determined" or "courageous" man from making his way to the mill, if he wanted to work. It was asked, in cross-examination of the plaintiff's officers engaged in these occurrences, why they did not take the men they wished to convey into the mill by boats on the lake, or in cars on the railroad, instead of through the streets; and the answer was that they had the right to use the streets for that purpose, as one of the ordinary and customary uses of streets leading to their mill. The attention of the court was called to section 3096 of the Revised Statutes of Ohio, authorizing the governor, the sheriff, the mayor, or any judge of a state or of the United States, to summon the militia to act in aid of the civil authorities in suppressing any tumult, riot, mob, or any body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force or violence to break or resist the laws of the state, or when there is any apprehension thereof. This bill was filed, alleging the facts in too general, but sufficient, terms, perhaps, and that the defendants have conspired together to wrongfully injure the plaintiffs' business and property, by illegally molesting and obstructing them in supplying the places of the strikers with other laborers who were anxious to be employed, and were willing to accept the wages offered them, but who were intimidated by the defendants, and not allowed to enter the mill for that purpose. It prays

an injunction against these alleged trespassers upon their right to contract with others than the strikers for the labor necessary to carry on their business. The case is now heard upon an application for a preliminary injunction.

Squire, Sanders & Dempsey, for complainant.

Arnold Green and M. A. Foran, for defendants.

HAMMOND, J. The foregoing is a sufficient and fair summary of the facts established by the proof. The court is not now engaged, as a criminal or police court, in trying offenders for assaults and battery, nor for engaging in tumults, riots, or mob violence, wherefore much of the testimony on both sides is quite irrelevant and inappropriate to this inquiry. It is not one of the present duties of the court to locate the blame for the occurrences which have been detailed in the affidavits and by the witnesses; and, indeed, either side may be blameworthy, or both, and that fact should not affect the question to be now decided; neither is the court properly concerned at this time about the rightfulness or wrongfulness of the strike, in relation to the causes which brought it about; and therefore the foregoing statement of facts does not at all deal with the details of the transactions and occurrences so voluminously set out in the proof. The only question is, does this proof, as a whole, justify a reasonable apprehension on the part of the plaintiffs that the defendants, in maintaining their strike, will illegally disturb their business and injure it by unlawful acts of violence and intimidation of outside laborers—"scabs," if you please—willing to work for the plaintiffs at the wages which they offer? Even "scabs" and those who employ "scabs" in time of a strike have rights which the strikers are bound by the law to respect. The most important of these rights is an unobstructed access to the place where the work is to be done, over the streets and highways by which it is to be approached. Nor is this freedom of access at all inconsistent with any right the strikers have to use the same streets and highways for the lawful conduct and maintenance of their strike by intercepting any one going to work in their place for the purpose of peaceful entreaty or argument against supplanting them. One authenticated instance in this proof where the strikers, meeting a single "scab," or a group of them, or an organized body of them, had stood aside, opened up the street, and allowed him or them to pass to the mill without more ado, after the entreaty or argument had failed to convince, would be worth more, as a matter of evidence showing the good faith of the strikers in their assertion that they were on the street only for an opportunity of entreaty and argument, than all the affidavits filed in this case. If the strikers, after their victory over Paulowski and his body of "strike breakers," had only lined themselves on each side of the street, and permitted them to go to work at the mill, that would have been conclusive evidence of their honesty and good intentions in the matter of confining their operations to entreaty and argument. So, of the struggle on the next day but one, when the officers of the plaintiff company led the "strike breakers," and of all the other occasions when workmen attempted to go to the mill notwithstanding the entreaty and argu-

ment which had been presented to them. That was precisely what the men wishing to go to the mill had a right to do after they had lingered or been detained long enough to receive the argument and entreaty of the strikers not to supplant them, that was precisely what the plaintiffs had a right to demand, and that right is guaranteed to them by the law of every free country where the right to work as one pleases, and to contract for labor as one chooses, is protected by law. It is the right not so much of property as of that liberty which every man enjoys in this country as his birthright; which is not confined to political rights alone, but extends as well to personal activities in and about one's daily business, be he laborer or capitalist; it is this right which lies at the foundation of the strikers' own freedom when they would work or refuse to work on any terms but their own; it is a right the striker lawfully cannot deny to the "scab,"—the right to pass freely through the streets and highways to his work. In this country this right to contract in business is a constitutional freedom, which not even state legislatures can impair; and certainly not strike organizations, for surely they cannot lawfully do what the legislature may not. *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 590, 17 Sup. Ct. 427.

It was frequently urged in argument that the strikers have a right to be on the streets; and so they have, so long as they do not trespass on the right of others to use them. The right of the use of streets by any one is a qualified right. The owner of a house, be it dwelling house, store house, or mill house, has a distinct right of property in the streets adjacent thereto, and used as approaches to it. It is the right of access,—free and uninterrupted ingress and egress. Any one who uses the streets must use them subject to this right of the householder; and there is not a particle of difference in respect of this between a dwelling house and a mill house or large factory employing large bodies of men, who always go to the polls and vote at elections, and sometimes go out on a strike. Nor is the freedom of contract and right of access through the streets to one's work at all affected by assumed peculiarities of conditions attending the struggles of men in the economic conflicts between laborers and capitalists, nor by any considerations of public policy in respect of these conflicts. In one of the great cases to be cited presently, what was said by an English judge is quite pertinent to this matter of strikes and boycotts, and interfering between employer and employé, namely, that public policy is "an unruly horse, and, when once a judge is astride it, he may be carried far away from sound law." If any one violate the right of the householder to the streets that are appurtenant to his property, as a part of it, by impairing his ingress and egress, he has a civil action, and he may also abate it by injunction in equity as a private nuisance. *In re Debs*, 158 U. S. 564, 587, 15 Sup. Ct. 900; *Griffing v. Gibb*, 2 Black, 519; *Railroad Co. v. Ward*, Id. 485; *Hart v. Buckner*, 5 C. C. A. 1, 54 Fed. 925; *Story, Eq. Jur.* (13th Ed.) §§ 920-924, and note a; 924a-927, and note 2, citing cases, 928, 929; *Daniell, Ch. Prac.* (5th Ed.) 1635-1639, and notes 3, 4; *Cooley, Torts*

(2d Ed.) 732-736, and note 7, citing cases, 737, and note 2. It is just as much a nuisance to block up the street and impair the right by the continual presence of bodies of men, great or small, who obstruct the ingress and egress, as it would be to build barricades and embankments in the street. In *re Debs*, *supra*. There can be no denial of this; and, when the blockading is done for the especial purpose of impairing the ingress to a particular house, it is directly a nuisance, which may be abated by injunction, if necessary. *Id.* This is sound law, from which no unruly horse of public policy should carry a judge any distance at all, no matter how ably it is urged upon him by learned and eloquent counsel pleading for the rights of labor as against capital, corporations, and despised foreigners, who organize "scabs" to resist the strikers in favor of odious trusts.

The defense that the plaintiff is a trust was sufficiently disposed of at the hearing by the statement that it cannot thus be made,—collaterally. If ousted by a judicial decree declaring it a trust, at the suit of the attorney general, then possibly it might be pleaded, but not now and here. Moreover, if it be a trust, it should be none the less odious when it yields to the laborers, and pays the wages they demand, or employs them before the strike begins, than when the strike is fully under way. Nor should it be any more odious because of the strike.

The whole fallacy of the defense against this bill and the proof offered to sustain it lies in a convenient misapprehension or a necessary misunderstanding of the character of that force or violence which all agree is not permitted in the conduct of a strike. It seems to be the idea of the defendants that it consists entirely of physical battery and assaults, and that if these appear in the proof, and they can be justified as they might be on a criminal indictment or in a police court, that ends the objection, and the justified assaults and batteries will not support an injunction. The truth is that the most potential and unlawful force or violence may exist without lifting a finger against any man, or uttering a word of threat against him. The very plan of campaign adopted here was the most substantial exhibition of force, by always keeping near the mill large bodies of men, massed and controlled by the leaders, so as to be used for obstruction if required. A willing wire worker, but a timid man, would be deterred by the mere knowledge of that fact from going to the mill when he desired to go, or had agreed to go, or, being already at work, feared to return through the streets where the men were congregated, or, having started, would turn back, fearing the trouble that might come of the attempt. Such a force would be violence, within the prohibition of the law; and its exhibition should be enjoined, as violating the property rights of the plaintiffs in the streets, their liberty of contracting for substituted labor, and the liberty of the substitutes to work if they wished to accept the lowered wages, and to pass through the streets to their work.

It only remains to cite the cases which establish this protection for the plaintiffs and their substituted laborers beyond all controversy.

But I wish to say particularly that this case is undeniably, in my judgment, supported most substantially by the dissenting opinions of Mr. Chief Justice Field and of Mr. Justice Holmes in the Massachusetts case, which were so earnestly relied on in the argument for the defendants; and I should think it would come within the most recent opinion of Judge Valliant in the Missouri case, a note of which was read, with commendation by counsel, from the Albany Law Journal. But the Debs Case, by the supreme court of the United States, is all-sufficient for every court. It settles every suggested defense against the defendants, and the writ of injunction approved in that case could be adopted almost verbatim in this, *mutatis mutandis*. In *re Debs*, 158 U. S. 564, 15 Sup. Ct. 909; *Id.*, 64 Fed. 724; *U. S. v. Kane*, 23 Fed. 748; *Casey v. Typographical Union*, 45 Fed. 135; *Cœur D'Alene Consolidated & Mining Co. v. Miners' Union of Wardner*, 51 Fed. 260; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 746; *U. S. v. Workmen's Amalgamated Council of New Orleans*, 54 Fed. 994; *Blindell v. Hagan*, 54 Fed. 40; *Id.*, 6 C. C. A. 86, 56 Fed. 696; *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 60 Fed. 803; *Thomas v. Railway Co.*, 62 Fed. 804; *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310; *U. S. v. Elliott*, 64 Fed. 27; *Ex parte Lennon*, 12 C. C. A. 134, 64 Fed. 320; *U. S. v. Agler*, 62 Fed. 824; *Oxley Stave Co. v. Coopers' International Union of North America*, 72 Fed. 695; *Id.*, 28 C. C. A. 99, 83 Fed. 912; *Elder v. Whitesides*, 72 Fed. 724; *Wire Co. v. Murray*, 80 Fed. 811; *Mackall v. Ratchford*, 82 Fed. 41; *Railway Co. v. McConnell*, 82 Fed. 65, and note, page 87; *Moores v. Bricklayers' Union*, 23 *Wkly. Law Bul.* 48; *Vegelahn v. Guntner (Mass.)* 44 N. E. 1077; *Sherry v. Perkins*, 147 *Mass.* 212, 17 N. E. 307; *Murdock v. Walker*, 152 *Pa. St.* 595, 25 *Atl.* 492; *China Co. v. Brown*, 164 *Pa. St.* 449, 30 *Atl.* 261; *Crump's Case*, 84 *Va.* 927, 6 *S. E.* 620; *Barr v. Council*, 53 *N. J. Eq.* 101, 30 *Atl.* 881; *State v. Stewart*, 59 *Vt.* 273, 9 *Atl.* 559; *People v. Wilzig*, 4 *N. Y. Cr. R.* 403; *Cogley, Strikes*, 256; *Reynolds v. Everett*, 144 *N. Y.* 189, 39 *N. E.* 72; *Curran v. Galen*, 152 *N. Y.* 33, 46 *N. E.* 297; *Shoe Co. v. Saxly*, 131 *Mo.* 212, 32 *S. W.* 1106; *Marks v. Paft*, 58 *Alb. Law J.* 112, note; *Steamship Co. v. McGregor* [1892] *App. Cas.* 25; *Allen v. Flood* [1898] *App. Cas.* 1.

Very much was said in argument about the Turks, Armenians, and Polacks employed as substituted workmen by the plaintiff, but the facts show that it has little foundation in fact, and should have not the slightest influence on this question, if it were true. There is no distinction in this country in the legal rights of classes, based on race or nationality, and all stand upon an equal footing in this respect. Foreigners are no longer treated as outlaws or barbarians by any civilized nation, and, if racial distinctions were to be considered in this case, there is a very beggarly show of Americans or Anglo-Saxons; and both the strikers and the strike breakers are a rather conglomerate aggregation of many races, except the negroes, who are conspicuous by their absence.

The court called on counsel to submit a carefully prepared order for injunction, to enable it to see what is asked by the prayer of the bill, which is in rather too general language, perhaps. The draft sub-

mitted is satisfactory, and the injunction will be granted. Ordered accordingly.

Mr. Green: I suppose it is limited to those against whom there is some evidence.

The Court: No. That is disposed of entirely in the opinion that has just been filed on overruling your motion to dismiss as to those parties. I have not read in your hearing that opinion, but it treats fully of that subject; and there will be no dismissal as to those parties, and no attention paid to the question of service.

Mr. Green: I wish to say this: There are comparatively few of these defendants that are members of the union, and as to a large number of those persons there was no mention whatever in the evidence.

The Court: In the supreme court of the United States—in the case of *Ex parte Lennon*, 54 Fed. 746, decided by Judge Ricks, and which afterwards went to the court of appeals and was there affirmed (12 C. C. A. 134, 64 Fed. 320), and then to the supreme court, where it was again affirmed (17 Sup. Ct. 658)—an injunction was held binding against a man who never was a party to the suit, and upon whom no service of process was ever made.

Mr. Green: That was in a contempt proceeding.

The Court: That is a test of it.

Mr. Green: I mean, against the men who answered separately and individually, that had nothing to do with it, and against whom there is no evidence,—I ask, will there be an injunction?

The Court: It will run against all parties to this suit, and all other parties who are liable to aid and abet them, according to the everyday practice.

Mr. Green: I wish an exception entered in behalf of each one of the defendants separately; and I ask the court, and I understand it has, a separate finding of facts from its conclusion of law.

The Court: It is not technically a finding of facts. It is a summary of the facts as the court views the testimony.

Mr. Green: Under our practice in the state courts—

The Court: That has nothing to do with the federal court. The practice in Ohio and the practice statutes of Ohio have no application in federal courts of equity.

Mr. Green: If I prepare a finding of facts, can I obviate the necessity of carrying up all these affidavits?

The Court: I could not do that. I am following the strict, technical practice of a court of equity in this proceeding; and I am sorry that I have not read from the bench the other opinion, as counsel then would be better informed as to the views of the court upon the question now submitted,—the opinion upon the application to vacate the service upon these parties.

Mr. Green: As I recollect the prayer offered by the other side, it does not reserve to the men the right to be upon the streets there, or go upon the street. I think there was a reservation—

The Court: When Mr. Green first arose, I was about to say that I have carefully considered the suggestion that he made in the brief

in that behalf, and the emendation suggested for this order; but I came to the conclusion that it was wise not to insert it, for the reason that any ignorant men who are to be dealt with by this process in the further progress of this cause might misunderstand such a reservation. The opinion of the court is clear enough in recognizing any rightful presence of the strikers on the streets, and it does not require any reservation to protect it. If any one in the further progress of this case should be charged with a breach of this injunction, if his presence on the street be rightful and not in violation of the rights of the plaintiffs or of the substituted workmen, there could be no judgment against him on a proceeding for contempt; so the question, technically, only arises then. Therefore the application to add what Mr. Green has suggested is not granted, and the order will be entered as it has been drawn by counsel for the plaintiffs. I think that is a very carefully drawn order, and that it meets the exigencies of the situation.

Mr. Foran: I understand the court in his opinion reserves the right to any man, irrespective of this opinion, to talk to another man upon the street anywhere in a peaceable and quiet manner.

The Court: Yes, of course. If the opinion is understood, the court distinctly announced that. The constitution of the United States protects him in that. The only question here is as to the form of the order, and I think this, as I said before, is carefully drawn, and does not trench upon that right, and it will be entered as it has been drawn.

The court thereupon directed the following order to be entered:
 The American Steel & Wire Company, Complainant, v. Wire Drawers' & Die Makers' Union No. 1, of Cleveland, Ohio,
 Walter Gillette, et al., Defendants.

Order.

No. 5,812.

This cause came on for hearing upon the bill of complaint, and complainant's application for a temporary injunction, upon the answers of certain of the defendants, and affidavits filed on behalf of complainant and defendants, and the testimony by way of cross-examination of certain of the witnesses in open court; and the court, being fully advised in the premises, finds that the complainant is entitled to a temporary injunction as follows:

It is hereby ordered, adjudged, and decreed that the Wire Drawers' & Die Makers' Union No. 1, of Cleveland, Ohio, Walter Gillette, its president, and Wire Drawers' & Die Makers' Union No. 3, of Cleveland, Ohio, Fred Walker, its president, and the officers and members of said unions, and each and all of the other defendants named in the complainant's bill, and any and all other persons associated with them in committing the acts and grievances complained of in said bill, be, and they are hereby, ordered and commanded to desist and refrain from in any manner interfering with, hindering, obstructing, or stopping any of the business of the complainant, the American Steel & Wire Company, or its agents, servants, or em-

ployés, in the operation of its said American Mill, or its other mills in the city of Cleveland, county of Cuyahoga and state of Ohio, or elsewhere; and from entering upon the grounds or premises of the complainant for the purpose of interfering with, hindering, or obstructing its business in any form or manner; and from compelling or inducing, or attempting to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employés of the American Steel & Wire Company to refuse or fail to perform their duties as such employés; and from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence, any of the employés of complainant to leave the service of complainant; and from preventing or attempting to prevent any person or persons, by threats, intimidation, force, or violence, from entering the service of complainant, the American Steel & Wire Company; and from doing any act whatever in furtherance of any conspiracy or combination to restrain either the American Steel & Wire Company or its officers or employés in the free and unhindered control of the business of the American Steel & Wire Company; and from ordering, directing, aiding, assisting, or abetting, in any manner whatever, any person or persons to commit any or either of the acts aforesaid. And the said defendants, and each and all of them, are forbidden and restrained from congregating at or near the premises of the said American Mill, or other mills of the American Steel & Wire Company in said city of Cleveland, for the purpose of intimidating its employés or coercing said employés, or preventing them from rendering their service to said company; and from inducing or coercing by threats said employés to leave the employment of the American Steel & Wire Company; and from in any manner interfering with the American Steel & Wire Company in carrying on its business in its usual and ordinary way; and from in any manner interfering with or molesting any person or persons who may be employed or seeking employment by the American Steel & Wire Company in the operation of its said American Mill and other mills. And the said defendants, and each and all of them, are hereby restrained and forbidden, either singly or in combination with others, from collecting in and about the approaches to said complainant's American Mill or other mills for the purpose of picketing or patrolling or guarding the streets, avenues, gates, and approaches to the property of the American Steel & Wire Company for the purpose of intimidating, threatening, or coercing any of the employés of complainant, or any person seeking the employment of complainant; and from interfering with the employés of said company in going to and from their daily work at the mill of complainant. And defendants, and each and all of them, are enjoined and restrained from going, either singly or collectively, to the homes of complainant's employés, or any of them, for the purpose of intimidating or coercing any or all of them to leave the employment of the complainant or from entering complainant's employment, and, as well, from intimidating or threatening in any manner the wives and families of said employés at their said homes.

And it is further ordered that the aforesaid injunction and writ of injunction shall be in force and binding upon each of the said defendants and all of them so named in said bill from and after service upon them severally of a copy of this order by delivering to them severally a copy of this order, or by reading the same to them; and shall be binding upon each and every member of said Wire Drawers' & Die Makers' Union No. 1, of Cleveland, Ohio, and Wire Drawers' & Die Makers' Union No. 3, of Cleveland, Ohio, from the time of notice or service of a copy of this order upon the said Walter Gillette and Fred Walker, and other members of said unions, parties defendant herein; and shall be binding upon said defendants whose names are alleged to be unknown from and after the service of a copy of this order upon them, respectively, by reading of the same to them, or by publication thereof by posting or printing; and shall be binding upon the said defendants and all other persons whatsoever who are not named herein from and after the time when they severally have knowledge of the entry of this order and the existence of this injunction. This order to continue in effect until the further order of this court, and upon said complainant's entering into bond, in the sum of \$2,500, conditioned for the payment of costs and moneys adjudged against them in case this injunction shall be dissolved.

And thereupon came said defendants by their counsel, and in open court gave notice of their intention to appeal this cause, and the court does allow said appeal upon the filing of an appeal bond in the sum of \$1,000.

The reservation proposed by Mr. Green and refused by the court in the foregoing proceedings is as follows:

But it is no part of this order that any of the defendants shall be restrained or enjoined from inducing, persuading, or advising others, by peaceable means, and without threats, force, or intimidation, from leaving complainant's employment, or from entering into the employment of complainant.

Addendum.

HAMMOND, J. When the foregoing opinion was prepared to be read and filed, I deemed it best to cut out a part of it which had dealt with the eloquent appeal of counsel to avoid the possible driving of workingmen to anarchy by repeated interference of the courts with an economic struggle that it would be better to leave unrestrained, except by the ordinary processes of police protection, in keeping down tumults, violence, or riot in the streets or elsewhere, or by criminal prosecution where the right of trial by jury might operate. The argument was based on a public policy to that end, more than on any denial of the authority of the court, as established by the precedents, and it seemed to me to belong rather to the domain of legislation than to that of judicial adjudication. Besides, it involved comments by the court upon the affidavits and oral proof of the police authorities, to the effect that this had been "the most orderly of strikes," and that they had been always ready,

able, and willing to afford police protection whenever that was required of them, by their own understanding of the conditions making it necessary to interfere. Inasmuch as it then seemed to me that such comments might be pretermitted, because the remedy in equity depended rather upon the fact of the efficiency of police protection than upon the state of mind of the police officials concerning the necessity for it, that was done, although it was the foundation of the argument for noninterference by the court that all essential restraint against violence could be found in the ordinary protection of the police and criminal laws. Upon reflection it now seems to me that it would have been better to have responded to that appeal of counsel to be let alone by the courts by showing why it was an impossible judgment by any court to withhold its protection under the circumstances of this case, when it was plain that the ordinary remedies suggested by counsel as sufficient were in fact inadequate to protect the plaintiff's rights of liberty and property, and as long as the police officials entertained the view of their duty in the premises which had been displayed by their affidavits. Therefore I have determined to reinsert that portion of the opinion which was left out, as follows:

It was suggested in argument that the courts should not interfere by injunction, but allow the employers and employed to maintain the struggle until one or the other should yield, and then such conflicts would become so costly to both sides that each would be willing to avoid strikes by adjustment. That would be a possible economic result, and yet if the parties, or either of them, have occasion to resort to the courts, or choose to invoke their aid in protecting their respective rights, neither can be repelled, and the courts must act. As before stated, considerations of public policy cannot govern them in respect of that, or direct their judgment. The public policy of keeping the courts always open for the redress of trespasses on personal liberty or property rights is quite as important as the other, and of older date. Moreover, it appears by this proof that the police authorities do not equally protect the contending parties, or permit them to "fight it out on fair terms in equal battle," by keeping the streets open for the equal use of transit to and from the mill, as they might. Of course, every official must decide his own responsibility, and regulate his action accordingly; but the affidavits of the mayor and the police officials, and their oral testimony, show that they do not consider that to be their duty, but only that they are required to suppress riot or tumult or personal violence by fighting. Indeed, the affidavit of the mayor is couched in almost the identical language of the statute of Ohio, read in our hearing by counsel for the defendants, authorizing the state and municipal authorities, including the judges, state and federal, to call out the militia under such circumstances (Rev. St. Ohio, § 3096), which shows that in the opinion of the mayor the police duty of protection against obstructed streets by bodies of men is limited to occasions when they fight, and when there is the same condition as that described in the statute for calling out the militia. It is complained by the plaintiffs that no arrests

were made in this case of any but their men, when fighting actually occurred; but that is immaterial here, since the right to an injunction is not dependent on any action or any failure to act by the police, as was decided in the Debs Case, to be hereafter cited. The director and superintendent of police take the same view of their duty as the mayor. While expressing, as the sheriff does, a willingness and ability to "take care of the strike," as it was expressed by counsel, by all necessary protection against violence, their notion of what constitutes violence is shown by their testimony not to extend to any clearance of the streets from crowds constantly maintained there to block any approach to the mill by wire drawers desiring to go to work in place of the strikers. One or both of these officials said there was never a condition existing when "a determined man" or "a courageous man" could not have made his way to the mill, if he desired to go; seemingly ignoring the timid or weak man needing their protection in that behalf; also ignoring the fact that protection mostly is needed by the timid, rather than the brave; and ignoring another fact, that the injury to one's business caused by hostile crowds in the street results more from the absence of those who stay away because of such crowds than from personal assault on those who are bold enough to encounter and contend with them for the right of passage through the streets. At all events, it is admitted and shown by the proof that the police have not kept the streets clear during all these weeks. If that had been done, it is not impossible that there would have been no occasion for the mayor's advice to the plaintiffs, as it appears in this proof, that they should "apply for an injunction," when they applied to him for that police protection to which their lawyer who conducted the correspondence thought they were entitled, but as to which he and the mayor so widely differed that counsel for the defendants characterized it as a play of political finesse between the two, as well as a strategic move on the part of the plaintiffs in preparation for this application for an injunction. The court is not concerned with this view of the proof, except so far as it bears upon the general fact that the plaintiffs cannot reasonably expect police protection from such occurrences as are shown by this proof to have already taken place, and may therefore be held to have established a not unreasonable apprehension of their recurrence. And I may also now add that the suggestion that the plaintiffs should introduce their substituted workmen surreptitiously, by way of the lake or by way of the rail, shows conclusively the misapprehension existing as to the right of the strikers on the street; as if it were a wrongful act to challenge their monopoly of the public streets, and as if they enjoyed, under the circumstances, some peculiar privilege, that the plaintiffs should recognize by adopting the extraordinary methods of ingress and egress suggested. If counsel entertained this anomalous view of the situation and the relative obligations, presumably the strikers did also.

NOTE. The form of the injunction order, substantially, is that of the Debs Case, 158 U. S. 564, 15 Sup. Ct. 900, at page 570 et seq., 158 U. S., and page

902, 15 Sup. Ct., changed only to suit the particulars of this case. My information always has been that that order was prepared under the supervision of the late attorney general, Mr. Olney, or received his sanction, as certainly it has since received that of the supreme court. This was so stated by counsel when the Debs strikers were enjoined in my own district. But whether that information was accurate or mistaken I have never known. The word "persuasion," so much objected to by counsel for the defendants, is used only in one of the clauses of the order, and its absence from the others is significant of its interpretation. It receives, also, a useful illumination from the opinions in the great case of *Allen v. Flood* [1898] App. Cas. 1, cited in the foregoing opinion, from the house of lords. In that case it was held, especially by some of the judges, that the walking delegate, Allen, had done nothing to induce the shipyard people to discharge the plaintiffs from any then existing contract which he had persuaded them to break, since there was in fact no contract between them, each having a correlative right to quit at will; or, indeed, that he had done nothing to disturb the relations of employer and employé, except to give the information, truthfully, upon which the employer acted in discharging the men. But the implied law of that case is that, if he had done either of those things otherwise than he did, there would have been a cause of action. It would have been then "wrongful," and in that sense legally "malicious." And, if a cause of action will lie, an injunction may be had whenever the equitable right also appears.

BAYNE et al. v. BREWER POTTERY CO. et al.

(Circuit Court, N. D. Ohio, W. D. December 21, 1898.)

JUDICIAL SALE—FAILURE TO COMPLETE BID—RESALE AT PURCHASER'S RISK—NOTICE.

A purchaser of property at a judicial sale, who fails to complete his bid, cannot be held for the difference between his bid and the price realized on a second sale, nor for the costs of such resale, unless he had notice that the second sale was to be made at his risk; and the fact that by his purchase he became a party to the record does not charge him with such notice, where there was no order that the sale should be so made.

In this case an order of sale of the property of the Brewer Pottery Company was issued, and the property, when first offered, was bid off by Albert Brewer, one of the defendants, for the sum of \$49,000. A deposit of \$5,000 was made to secure the sale. The sale was confirmed, but the purchaser, Brewer, failing to complete his bid, the deposit of \$5,000 was declared forfeited; and the sale was set aside, and a new sale was ordered, after Brewer had filed a written statement that he would not complete his bid. At a subsequent sale the property was bid off by Samuel B. Sneath, trustee, for \$36,075; and a motion was filed by the receiver for an order to compel Brewer to pay into court, for the use of creditors, the sum of \$7,925, the difference between his bid and the amount of the second sale, after the deposit of \$5,000 was credited thereon.

Hoyt, Dustin & Kelley, for complainants.

E. W. Tolerton and John K. Rohn, for Samuel B. Sneath, trustee.

RICKS, District Judge. Very able and full briefs have been filed by counsel in this case. It was eminently proper that counsel should give the questions involved very careful consideration, both because

they are questions not common to practice, and because of their importance to the parties concerned.

It is conceded that the orders made by the court on the report of the master's proceedings under the first order of sale are a correct presentation of the facts in the case. The main question to determine now is whether the purchaser was entitled to a notice that the second sale ordered was to be made at his risk, and whether in fact such an order was made, and communicated to him. I think it devolved upon the parties who intended to hold the purchaser liable for any deficiency between the bid under the first order of sale, and the amount for which the property sold under the second order of sale, to see that such purchaser had positive notice that the said second sale was made at his risk, both as to the extra costs caused thereby, and as to the deficiency between the two bids. It is contended on the one part that such an order was not necessary, as the purchaser was a party to the suit. There is no doubt about the fact that the bid made the purchaser a party to the proceedings, and that thereafter he was clearly under the jurisdiction of the court. This would probably make it unnecessary that he should have any further notice of the proceedings than any other party to the suit, but, as the record does not show any order of the court that the second sale should be made at his risk, the fact that he was obliged to take notice of what was in the record does not meet the contention. The proceedings in court did not, as a matter of fact, show that the second sale was to be at the purchaser's risk. I think this was a mistake, and cannot be cured. See *Stuart v. Gray*, 127 U. S. 527, 8 Sup. Ct. 1279; *Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. 246; 2 *Daniell*, Ch. Prac. (Last Ed.) p. *1282, note 2, and cases. We must concede the force of the contention that a purchaser is entitled to notice that the second sale of property, made because of his failure to complete his bid at the first sale, is to be at his risk. With such notice, he can attend the sale, prepared to protect himself by such proceedings as he is advised are proper. Without such notice, he might be wholly indifferent as to the result of the second sale, because, not having been notified that he had any risk in connection therewith, he might properly treat it as a matter in which he was not particularly concerned. I think the later authorities and practice sustain the proposition that, in order to hold him for a deficiency, he must have notice that the second sale was at his risk.

KOHN v. McKINNON et al.

(District Court, D. Alaska. October 24, 1898.)

No. 672.

1. PLEADING.

The objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to take the objection by demurrer.

2. ADMINISTRATORS—THEIR POWER OVER REAL ESTATE OF DECEDENT.

Executors and administrators have no power over the real estate of their decedents, except such as is conferred by statute or the will of the testator.

3. SAME—LAWS OF OREGON.

The laws of Oregon in force May 17, 1884, on this subject, are the laws of this district; and, under these, executors and administrators are entitled to the possession of the real estate of their decedents for the purposes of administration only.

4. EJECTMENT.

They cannot maintain actions in ejectment to recover possession of real estate claimed to be the property of the deceased.

5. STARE DECISIS.

While the doctrine of stare decisis is not absolutely applied to decisions of the supreme court of Oregon on the questions at issue, yet, the laws of that state having been extended to Alaska, it must be presumed that the congress was familiar with the construction put upon the statutes of that state by its highest court, and the decisions of that court should therefore have great weight with this court.

(Syllabus by the Court.)

This was an action in ejectment brought by plaintiff, as administrator, against the defendants, to recover the possession of certain real estate claimed to be the property of the deceased.

M. J. Cochran, Charles D. Bates, and K. M. Jackson, for plaintiff.
A. G. McBride and C. H. Sundmacher, for defendants.

JOHNSON, District Judge. On the 17th day of June, 1898, the plaintiff commenced an ordinary action in ejectment against Duncan McKinnon and 11 other persons named as defendants. The premises sought to be recovered are described as certain lots or parcels of land situate in the town of Ft. Wrangel, Alaska. To the complaint no demurrer was filed, but the defendants made answer, some of them denying the allegations of the complaint, and setting up title to the premises in themselves, while others pleaded that they only claimed possession of the premises by virtue of being tenants of McKinnon, and all disclaimed as to part of the premises described in the complaint. To the answers of Duncan and Mary McKinnon the plaintiff demurred, and at the same time moved for judgment against all of the defendants for that portion of the premises to which all had disclaimed any interest. While argument was being made on the demurrers to the answers, the court raised the question of the right of the plaintiff, as administrator, to maintain the action, whereupon defendants asked leave (which was granted) to amend their answers by inserting the clause, "The facts stated in the complaint do not constitute a cause of action." The answers being thus amended, all the questions raised were by mutual consent submitted to the court upon oral arguments, and briefs filed.

It would undoubtedly have been better pleading had a demurrer to the complaint been filed on the statutory grounds (1) "that the plaintiff has no legal capacity to sue," and (2) "that the complaint does not state facts sufficient to constitute a cause of action," and the court asked to dispose of the demurrer before requiring defendants to answer. However, by section 71, p. 210, Hill's Ann. Laws Or., which is the law of this district, governing this case, the objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to take the objection by demurrer. Bowen

v. Emmerson, 3 Or. 452; Evarts v. Steger, 5 Or. 147; Olds v. Cary, 13 Or. 362, 10 Pac. 786.

The sufficiency of the complaint being put in issue by the amended answers, it is best to first dispose of that issue; for, if it shall be found that the complaint does not state facts sufficient to constitute a cause of action, it will be unnecessary to pass upon the demurrers to the answers and the motion for judgment. The real question before the court is, can the plaintiff, in his capacity as administrator, maintain this action against the defendants? If he can, then the complaint states facts sufficient to constitute a cause of action; otherwise not. All of the powers of administrators must necessarily be derived from, and their duties prescribed by, either the common law or statutory enactments. At common law, real estate becomes vested, on the death of the owner, in his heirs or devisees, and the executor or administrator has no inherent power over it. It is only as legislation or the will of the testator may have conferred an express power upon the executor or administrator that he can exert it in respect of real estate. Schouler, Ex'rs, § 212. He has no cause to recover possession of the lands of the deceased by a suit at law, and cannot maintain such suit. *Id.* §§ 213-509, and authorities cited. By an act of the congress providing a civil government for Alaska, passed May 17, 1884, the general laws of the state of Oregon then in force were declared to be the law of this district, so far as the same were applicable, and not in conflict with the provisions of that act or the laws of the United States. The laws governing the administration of estates, and defining the powers and duties of executors and administrators, then in force in the state of Oregon, are applicable to the district of Alaska, and are not in conflict with any law of the United States upon the subject, and are therefore the laws of this district. To these statutory provisions, then, and to these only, must we look in determining the question before us:

"Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages, for withholding the same, by an action at law." Hill's Ann. Laws Or. p. 378, § 316.

"The executor or administrator is entitled to the possession and control of the property of deceased, both real and personal, and to receive the rents and profits thereof until the administration is completed, or the same is surrendered to the heirs or devisees by order of the court or judge thereof." *Id.* p. 720, § 1120.

Under these provisions of the Code, has an administrator such a legal estate in the property of the deceased as will empower him to maintain an action in ejectment to recover the possession of real estate claimed to be the property of the decedent? We think not. In a brief of more than ordinary merit, counsel for plaintiff relies much upon the case of Balch v. Smith, 30 Pac. 648. This was a case arising under the laws of the state of Washington, and decided by the supreme court of that state. It is not necessary to go beyond the opinion of the court itself to see that the laws of that state are broader, and yet more specific, in defining the powers of executors and administrators, than any law we have upon the subject. Indeed, that court relies entirely and absolutely upon the state statutes when it holds that administrators must take possession of all the property of the

decedent, and that, therefore, even an heir is not entitled, as against him, to the possession of the real property. Section 956 of the Code of that state is similar to section 1120 of our laws, heretofore quoted. But in addition to that section we find that sections 1041-1044 of the Code of that state provide, among other things, that executors and administrators shall take into their possession all the estate of the deceased, real and personal; that actions for the recovery of any property, real or personal, or the possession thereof, may be maintained by and against them; that they may maintain actions for trespass committed on the estate of the deceased during his lifetime, and actions may be maintained against them for trespass. It will thus be seen that the laws of Washington, by direct enactments, confer upon administrators the right to maintain actions in ejectment, while our statutes are silent upon the subject. What is here said of the laws of Washington applies with equal force to the laws and decisions quoted in plaintiff's brief from Montana. *Black v. Story*, 7 Mont. 238, 14 Pac. 703; *In re Higgins' Estate*, 15 Mont. 485, 39 Pac. 506. Upon examination it is found that, while Montana has a law very similar to our section 1120, it also has other laws which we do not have, by virtue of which the supreme court of that state holds that administrators may maintain actions in ejectment for the recovery of the real estate of their decedents. The right of the administrator to the possession of the real estate of the deceased for any purpose whatever being in contravention of the common law, statutory authority to take possession must be directly and clearly conferred, or he must fail in any action instituted by him for that purpose.

While the doctrine of *stare decisis* may not be binding upon this court in this case, yet we think the decisions of the highest court of the state of Oregon in construing the statutes quoted should not be departed from, without the gravest reasons for so doing. "Where the legislature of one state adopts by enactment the statute of another state, it may be said, as a general rule, that the courts adopt the construction put upon such statute by the courts of the state from which it was taken; this, upon the presumption that the legislature was familiar with the construction put upon the statute in the state from which it was taken." 23 Am. & Eng. Enc. Law, p. 24, and authorities cited. Applying this principle to the case at bar, and remembering that the congress extended the laws of the state of Oregon in force May 17, 1884, to Alaska, and that the supreme court of that state had in more than one case passed upon the statutes being construed in this case, prior to that date, we must presume that the congress was familiar with the construction put upon these statutes, and the decisions of that court should therefore have great weight with us. In 1873 the supreme court of Oregon, in the case of *King v. Boyd*, 4 Or. 327, decided that an administrator had no authority to institute a suit to set aside a conveyance of real estate made by his decedent in his lifetime, without leave first had and obtained from the county court, or judge thereof. While the case is not identical with the one at bar, the reasoning of the court is in point. The court says:

"We think it would be an unwise and unwarranted construction of the authority of executors or administrators to infer from any language found in

the statute on that subject that they might, upon their own motion, institute suits to set aside conveyances, or remove clouds from titles to real estate, without any showing, as a condition precedent, that the possession of the same was wrongfully withheld, or that there was any necessity for selling the same, or any part thereof, to satisfy claims against the estate."

This language will appear all the more pertinent to the case at bar when it is remembered that the pleadings disclose the fact that the deceased had been dead nearly nine years before this action was brought; that two administrators have been appointed to administer the estate; that more than five years elapsed after the alleged trespass of defendants before this action was instituted; that there is no allegation that the land in question is needed to pay the debts of the estate, or, in fact, that there are any creditors of the estate whatever. The administrator's right of possession of the real estate of his decedent is for the purpose of administration only. These purposes are almost, if not quite, wholly to enable the administrator to apply the rents and profits, or, if need be, the proceeds derived from a sale, of the real estate, to the payment of the debts, and to distribute the remainder to the heirs. If there be no debts, as in this case, the bald right to distribute the estate to the heirs, alone, remains to the administrator; and for the purpose of exercising this right, only, an administrator is not warranted in bringing an action in ejectment. We can but commend the following language used by the court in *King v. Boyd*, *supra*.

"No one is better qualified to litigate the title to real estate than the person who owns it. An administrator, who has no direct interest in the result of a suit,—who personally loses nothing if the suit be injudiciously instituted and adversely determined,—is not as safe a person to intrust with the right to litigate as he who is the owner of the property which is the subject of litigation, and the one who must suffer if the determination of the cause be adverse to him. A due regard for the rights of both heirs and creditors of estates, we think, demands that the limitations of our statute on the authority of executors and administrators to institute suits affecting the title to real estate should be carefully guarded, so that estates may not be subject to be consumed by the costs and expenses of ill-advised lawsuits."

In *Humphreys v. Taylor*, 5 Or. 261, the supreme court of that state holds specifically that executors and administrators have not such an estate in the lands of the deceased as will enable them to maintain actions for the possession thereof. And we know of no case since these quoted where that court has reversed or modified these decisions. Counsel for plaintiff quotes *Butler v. Smith*, 20 Or. 130, 25 Pac. 381, claiming it to be in conflict with *Humphreys v. Taylor*; but, upon a careful examination of that case, we cannot concur in this contention of counsel. The case of *Starr v. Murray*, tried in this court some years ago, although not reported, turned upon the identical points raised in this case; and this court then held that *Starr*, as administrator, could not maintain his action.

Upon the argument of the case, counsel for plaintiff maintained that, even if the administrator could not maintain this action alone, in his representative capacity, he might do so jointly with the heirs. But, if there be no creditors,—no debts to pay,—we can see no reason why the estate should not be closed, nor why the heirs are not the proper persons to bring the action. However, we will give the plain-

tiff 30 days from the filing of this opinion in which to file an amended complaint. If none be filed within that time, the action will be dismissed for the reasons herein stated.

ALLEN-WEST COMMISSION CO. v. PATILLO et al.
(Circuit Court of Appeals, Eighth Circuit. October 31, 1898.)

No. 820.

1. CONTRACT—EVIDENCE TO ESTABLISH—ESTOPPEL BY ACQUIESCENCE.

Where plaintiff, who was making advances to defendant, advised him by letters and by statements, from time to time, of the contract under which such advances were made, as he understood it, the defendant could not remain silent, and obtain future advances, without dissenting from such understanding, and afterwards deny the existence of the contract.

2. ACCOUNT STATED—IMPLIED ASSENT OF PARTY—OBLIGATION TO PAY BALANCE.

A failure to object for two years to a statement of account rendered by a factor to a customer, which included, in connection with other commissions and interest on advances made, a charge for commissions on cotton not shipped to the factor, but on which he claimed commissions under a contract between the parties, renders the account a stated one; and, in an action thereon, the question of the right to charge such commissions is not in issue, the contract implied being to pay the balance shown to be due.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

U. M. Rose, W. E. Hemingway, G. B. Rose, and J. M. Moore, for plaintiff in error.

W. S. McCain, Farrar McCain, H. A. Tilletts, and J. W. House, for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This was an action at law, brought by the plaintiff in error against the defendants in error, to recover \$2,732.50, with interest, charged for commissions alleged to be due from the defendants to the plaintiff of \$1.25 per bale, on 2,186 bales of cotton which the plaintiff alleges the defendants failed to ship to it as a cotton factor and commission merchant at St. Louis, Mo., pursuant to the terms of an oral agreement made and entered into by and between the plaintiff and the defendants in the early part of the year 1891. The plaintiff's petition contains the following allegations:

"And plaintiff alleges that, some time in the early part of the year 1891, defendants applied to plaintiff to transact their business as cotton factors and commission merchants at the city of St. Louis, and to make them advances of money to be used in their business from time to time, as the same might be needed, and agreed with the plaintiff, if it would make such advances, to ship plaintiff one hundred bales of cotton for every thousand dollars of spring and summer advances, and, if they should fail to ship said amount of cotton, to pay plaintiff the customary commission of \$1.25 per bale for each bale they might fail to ship, and further agreed to carry out said agreement as long as they should retain and have the use in their aforesaid business, of plaintiff's money and advances during the spring and summer; that thereupon

plaintiff, during said year and subsequent years, transacted business with and for the defendants in their capacity as cotton factors and commission merchants, making them large advances of money for the purpose of enabling them to carry on their business and control the shipment or sale of the cotton of their customers. And plaintiff alleges that during the continuance of said business, down to and including the year 1893, it furnished defendants at stated periods, and at other times when requested, statements of the account between them, which were received by defendants without objection; that, at the end of the year 1893, plaintiff furnished defendants a statement of account showing a balance due it for advances made by plaintiff to defendants, and for commissions on cotton which defendants had theretofore failed to ship to plaintiff, under and in accordance with their aforesaid agreement; whereupon, shortly thereafter, defendants, without objection, paid plaintiff on account the sum of \$2,996.27, leaving a balance due plaintiff of \$2,504.75, which sum, with interest thereon, and the further sum of \$508.53, due for commission on four hundred and seven bales of cotton, which, under the understanding and agreement between the plaintiff and defendants as aforesaid, defendants should have shipped to plaintiff during the season of 1893 and 1894, and did not ship, is now due by defendants to plaintiff. Plaintiff herewith files a verified account thereof, marked 'Exhibit A.'"

The defendants, in their answer, denied that they ever made the contract set out in the complaint, and denied that they agreed with the plaintiff, if it would make advances in money from time to time, that they would ship it 100 bales of cotton for every \$1,000 advanced to them during the spring and summer by the plaintiff, and that, if they failed to ship the said amount of cotton, to pay plaintiff the customary commission of \$1.25, or any other sum, per bale, for each bale they failed to ship.

Mr. James H. Allen, president of the plaintiff company, testified to the contract substantially as set out in the petition; and, in connection with his testimony, the plaintiff offered in evidence a number of letters written by the plaintiff to the defendants, in which defendants' attention was especially called to the agreement to ship a bale of cotton for every \$10 of spring and summer advances, or pay the commission on the same. This is in a way denied by Mr. George W. Smith, the member of the firm of Smith, Patillo & Co. with whom Mr. Allen said the contract was made. In his testimony we find the following questions and answers in relation to the conversation had with Mr. Allen in the spring of 1891:

"Q. What was said about \$1.25 per bale for that not shipped? A. If Mr. Allen said anything about that, I do not remember it. Q. When is the first time you heard of any agreement about paying \$1.25 per bale for cotton not shipped? A. Mr. Exall and I had a talk about it. Q. You think there was no such contract with Mr. Allen when you and he talked over the matter? A. No, sir; I do not think there was. Q. He has said something about an understanding that if you did not pay him up that year, and he had to carry you over, you would ship him a bale of cotton for every \$10, or pay him \$1.25 per bale for the amount carried over? A. No, sir; if I ever made an agreement with Mr. Allen I do not remember anything about it."

While Mr. Smith here seems to deny the contract; yet his answers indicate that he did not have a very distinct recollection of the conversation at the time he testified. However that may be, it is in evidence that as early as April 3, 1891, which was very soon after the conversation between Mr. Allen and Mr. Smith in St. Louis, the plaintiff wrote to the defendants, and in its letter referred to the conversa-

tion with Mr. Smith and the fact that he had guarantied a bale of cotton for every \$10 of spring and summer advances. Again, on the 29th of October, 1891, the plaintiff wrote to the defendants calling their attention to the agreement to ship a bale of cotton for every \$10 of spring and summer advances, or pay commissions on the same. And on the 27th of May, 1892, defendants' attention was called to the amount of commission that would be charged on cotton not shipped under the contract, to which the defendants, on June 2, 1892, replied as follows:

"In reply to yours of late date, will say we answered your letter referred to, and stated that, as soon as you had sold all of our cotton, we would have a settlement, at which time would try and make our account satisfactory. The above statement we hope will reach you and be satisfactory."

June 24, 1892, commissions on 820 bales of cotton, at \$1.25 per bale, amounting to \$1,025; September 1, 1893, commissions on 959 bales of cotton, at \$1.25 per bale, deficiency for the seasons of 1892 and 1893, amounting to \$1,198.75; and on September 1, 1894, commissions on 407 bales of cotton, at \$1.25 per bale, amounting to \$508.75,—were charged against the defendants in the accounts furnished them by the plaintiff. The defendants made no objection to these commission items of the accounts until some time in 1894.

At the trial, plaintiff requested the court to instruct the jury that:

"In considering the question as to whether such an agreement as was testified to by James H. Allen, the president of the Allen-West Commission Company, was entered into between the plaintiff and the defendants, the jury should take into consideration and give due weight to the letters written by the plaintiff to the defendants, and the answers thereto, or the failure of the defendants to answer letters written them by the plaintiff on that subject; and the court instructs you that if the defendants were informed, through letters written them by the plaintiff, that it was the understanding that such a contract had been entered into, and that plaintiff would make advances or carry over during subsequent seasons money advanced by it to the defendants on the strength of such an agreement, it was the duty of the defendants, imposed upon them by fair dealing and good faith, to advise the plaintiff in case they disputed or did not recognize the existence of such an agreement. They did not have the right to remain silent and leave the plaintiff under the impression that they were not¹ assenting to plaintiff's understanding of the terms upon which they were doing business."

The court refused to give the entire instruction, and in this, we think, there was error. The letters offered in evidence show conclusively that the defendants were not, and could not have been, ignorant of the terms of the contract as to cotton not shipped, upon which the plaintiff was acting; and good faith required that they should promptly notify the plaintiff of the fact if they did not consent to the terms.

The plaintiff also requested the court to instruct the jury that:

"Defendants cannot dispute their obligation to pay the item of \$1,025 charged in the statement rendered to them by the plaintiff for commissions on cotton not sold on the 1st of July, 1892, unless such charge was made in pursuance of an agreement between the parties which the jury find from the evidence to have been usurious."

This and other requests, relating to other commission items of the accounts, were also refused by the court, and to the rulings of the court

¹ The insertion of the word "not" in this instruction was undoubtedly a clerical error in drafting it.

proper exceptions were reserved. After a very careful examination of the record in this case, we are inclined to the opinion that the instructions requested, or at least the one above quoted, should have been given. As we view it, this was a factor's charge for commission under his contract with his principal, and related to the same subject-matter as the interest and other commissions; that it could not have been omitted from the account stated without thereby waiving the right to it, and binding the plaintiff to a stated account which did not include it; and, when the defendants received it, accepted it, and acted and permitted the plaintiff to act upon it, it became a stated account against them, which could only be set aside by proof of fraud or mistake. To make an account a stated, settled, or liquidated one, it need not be signed by the parties; it is enough that it show a balance, or that there is none. If one merchant sends an account to another, and he keeps it an unreasonable length of time without objection, the rule of courts and merchants undoubtedly is that it is understood as a stated account. Thus, where the parties lived in England, it was held that not objecting to the account by the second or third post was an allowance of it. 2 Vern. 276. The time within which an account shall be taken as a stated one unless objected to cannot be definitely fixed. It depends upon the circumstances of the case,—whether an acquiescence or presumed agreement of the correctness of the account exists. If it does, and the party does not account for his silence, the account is considered as settled to his satisfaction, and the party claiming the balance is not bound to prove the items of his account. A party charged may undoubtedly show errors and omissions apparent in the account, but the burden of showing them is upon him who receives and keeps the account without objection. *Freeland v. Heron*, 7 Cranch, 147. The errors in the account must be specified. They will not be corrected on doubtful testimony. They must be made to clearly appear. While the party charged may surcharge and falsify the account as to particular items, he cannot open it generally, unless there has been fraud practiced upon him. In a case where an account of moneys paid for insurance and on other transactions between agent and principal had been rendered annually, and interest charged at the close of every year on the balance, and the interest with each preceding year added to the principal, and no objection was made when the accounts had been rendered until the expiration of 10 years from the first account, the interest so charged was allowed. 3 Camp. 466. The acquiescence in the accounts rendered was evidence from which it might well be inferred that the defendants who received the accounts without objection agreed to continue that course of dealing, and to retain the balance in their hands, rather than to pay it. It was a tacit assent to the terms demanded by the plaintiff on the face of the accounts rendered, which was direct notice, independent of the letters, of its understanding of their agreement. If the defendants were not content, they were bound by every principle of fair dealing to give notice of their dissent. The balance due was the capital of the plaintiff which it left in the defendants' hands on paying commissions and interest. If it is not recoverable, then its capital consists in a barren balance, while the defendants use it to a profit. The law does not impose any such

hardship upon the ordinary merchant who makes profit by his dealing; still less on the factor, who receives only commission and interest on his advances. We think it cannot be said that this is simply a demand for unliquidated damages for the breach of a contract. The recovery sought was for commissions on cotton not shipped; the accounts furnished to the defendants so stated; and in addition to the charges therefor, set out in the accounts, the plaintiff repeatedly advised the defendants by letter of the terms of the agreement, and that these items for commissions on cotton not shipped would be charged, to which no objection was made by the defendants for more than two years after the account was opened. If the law will presume an agreement from silence in any case, we think it will in this case, and that the accounts which have been rendered by the plaintiff, and received by the defendants without objection, must be considered as stated or settled accounts, and as liquidated by the parties, as fully so as if they had been signed by both. The balance is a debt as a matter of contract implied by the law. It is to be considered as one debt, and a recovery may be had upon it without regard to the items which compose it. *Atkinson v. Allen*, 71 Fed. 58, 60, 15 C. C. A. 570, 572, and 36 U. S. App. 255, 260; *Porter v. Price*, 80 Fed. 655, 657, 26 C. C. A. 70, 72, and 49 U. S. App. 295, 300.

The judgment of the circuit court is reversed, and the case remanded, with directions to grant a new trial.

MARTIN v. HUGHES et al.

(Circuit Court of Appeals, Third Circuit. November 14, 1898.)

No. 9.

1. EVIDENCE—BOUNDARY—DECLARATIONS OF DECEASED SURVEYOR.

The declarations of a deceased surveyor, unless made on the ground in controversy, are not admissible to establish a boundary in Pennsylvania, though made in court under oath in an action between different parties.

2. BOUNDARIES—SURVEY—RETURN BY SUCCESSOR IN OFFICE.

A warrant for land was issued by the commonwealth in 1794, and a survey was made thereunder in the same year by a deputy surveyor, who died without having made his return. In 1808 his successor in office made return of the survey made by his predecessor as authorized by law, and a patent was issued thereon, under which the land has been held since that time. *Held*, that after such lapse of time the return was not open to question, and the marks of the survey of 1794, if they could be identified on the ground, controlled as to the location of the tract, and could not be displaced by marks of a survey made in 1808, on the theory, unsupported by other evidence, that the surveyor making the return based it upon a new survey made by himself.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

This was an action in ejectment by John C. Martin against Charles A. Hughes and others. There was a judgment for defendants, from which the plaintiff brings error.

C. Heydrick, for plaintiff in error.

M. D. Kittell, for defendants in error.

Before **ACHESON** and **DALLAS**, Circuit Judges, and **BUTLER**, District Judge.

BUTLER, District Judge. The plaintiff brought ejectment under a title from the commonwealth, in pursuance of a warrant issued to Isaac Brennan, March 25, 1794, a survey thereunder by Deputy Surveyor George Woods, a return of this survey by his successor in office, in 1808, and a patent based thereon soon after. Three other warrants were issued contemporaneously with Brennan's, one of them to Richard Smith, another to William Smith and a third to John Nicholson, for lands in the same locality, and surveys made in pursuance of them by Woods contemporaneously with the survey for Brennan. Woods dying without having made returns of these surveys, they were made by his successor in office, William O'Keefe, in June, 1808; and patents were issued accordingly. The return on William Smith's warrant calls for a beech tree as its northwestern corner; a line running thence north; a road crossing that line obliquely at a distance of 30 rods from the corner; and a line running north and west from its northwest corner. The return on the Nicholson warrant calls for land of William Smith on the east; a cedar tree near a beech, as its northeast corner; lines running thence north, east and west; the "state road" crossing this line, running north in the same oblique direction shown on the return of the William Smith survey, at a distance of 30 rods from the corner; for Isaac Brennan's land on the north; and extending 30 rods west of Nicholson's northwestern corner. The calls of the return on the Isaac Brennan warrant reciprocate calls of the other returns, specifying a cedar tree as its southeastern corner; John Nicholson as an adjoiner on the south, declaring that the survey starts at the cedar and extends west 30 yards less than the length of its southern line; and that lines run from the cedar north and south, and so on.

The defendants claim under a title from the commonwealth in pursuance of a warrant issued to James Duncan in March, 1794, and a survey made thereunder in 1853.

The question involved in the suit is: Where was the controverted line of the Brennan survey located? The plaintiff claims that it started in a northerly direction at the cedar near a beech, as described in the return, and located by his testimony; while the defendants claim that it started at a point called "the cedar stump" or "big cedar," about 40 yards westward, where marks are found, made in 1808. Each of these claims is supported by testimony, and under the instruction of the court a verdict was rendered for the defendants. The plaintiff complains of this instruction, and also of the rejection of certain testimony. The specifications of error are as follows:

The learned court erred below:

(1) In overruling the plaintiff's offer of the testimony of William Griffith, a surveyor, then deceased, delivered upon the trial of a certain cause in the court of common pleas of Cambria county, Pennsylvania, in the year 1885, in which David Smay, through whom the defendant below deduced title to part of the Duncan tract, Record 17-23, was plaintiff, and the plaintiff below was defendant, to the effect that in or about the year 1835, he made a survey of the John Nicholson tract, in doing which, he found at the point claimed by the plaintiff (below) as the common corner of the Brennan, Nicholson and Smith tracts a

cedar tree and a beech tree, each marked on four sides as a corner, standing just so far apart that he could stand between them; that the cedar stood to the southwest of the beech and that he could set his compass between the trees and turn it upon any one of the four lines and see marks on any one of the four lines around it; that subsequently the beech tree was blocked and showed marks of 1794 and 1808, and that there was an old, well-marked line running north and south from the cedar and beech; and that in 1835 the corner marks on the cedar were apparently old; the same having been reduced to writing by the official reporter of the court, and being offered, first, as a deposition, and, second, as the declaration of a deceased surveyor, and rejected upon each offer. Record, 87-8.

(2) In its answer to the plaintiff's second point, which point was as follows: "It appears by the official return that the Isaac Brennan tract was surveyed by George Woods, Jr., in June, 1794, and therefore if marks made upon the ground by the surveyor in locating the Isaac Brennan tract have at any time been found and their position identified, they must control the location of the tract;" and was answered as follows: "This point is affirmed if the jury find that George Woods, deputy surveyor, surveyed the land as stated and his survey was adopted and returned by William O'Keefe, his successor in office," Record, 88; and in not unqualifiedly affirming the point.

(3) In its answer to the plaintiff's fifth point, which point was as follows: "If the jury believe from all the evidence that three tracts of land mentioned in the preceding point (namely the Smith, Nicholson and Brennan) have a common corner, that would fix the eastern side of the Isaac Brennan, and the same could not be changed by the subsequent survey made of the James Duncan in 1853;" and was answered as follows: "We have already explained that to you, that if the true line of the Isaac Brennan was as claimed for by the plaintiff in this case, and the survey was made at the early date claimed, that the subsequent survey of the James Duncan tract in 1853 overlapping the Isaac Brennan must give way to the older survey." Record, 89.

(4) In charging the jury as follows: "Now these surveys (namely of the Brennan, Smith and Nicholson tracts) if they were made by George Woods upon the ground, William O'Keefe, the deputy surveyor, or who seems to have been his successor, had a right to return, and so far as the effect of the surveys is concerned, the act of the deputy in surveying them was the act of the principal, or George Woods, if he made the prior survey. * * * On the face of the papers [the returns of surveys of the Brennan, Smith and Nicholson tracts], the inquiry will naturally arise to you: If these surveys, if these are returns of surveys made by George Woods in 1794, and if those surveys were made in the month of June, and presumably at the same time—if those be returns of his survey, did George Woods mean the same corner by these three different designations, if they are different, namely, one a beech, one a cedar and one a cedar near a beech." Record, 91.

(5) In its answer to the defendants' second point, which point was as follows: "The plaintiff to make out his case having given in evidence the return of survey made by William O'Keefe in 1808, and a patent founded on that return, he is concluded by the boundaries therein set out and as found upon the ground;" and was answered as follows: "Affirmed."

(6) In its answer to the defendants' third point, which point was as follows: "There is no evidence of any return of survey on warrant to Isaac Brennan earlier than the O'Keefe return in 1808, and the location therein set out by its metes and bounds, is the true location of the Isaac Brennan tract;" and was answered as follows: "In answer to this we may say: The return in question is the only one, and is evidence of the true location of the tract. As thus stated the point is affirmed; that is, it is evidence of the true location of the tract, and is to be considered as we have stated to you in connection with the marks you find upon the ground."

The first specification is not sustained. The declarations of the deceased surveyor were not competent evidence. Under the laws of this state such declarations, made on the ground in controversy, may be received after the surveyor's death. Whart. Ev. § 191; *Kramer v. Goodlander*, 98 Pa. St. 366; *Moul v. Hartman*, 104 Pa. St. 43. The declara-

tions offered were not so made; and they were not, therefore, admissible. That they were made in court under oath, is unimportant. That they were not admissible as a "deposition" of the surveyor (as at first contended) is now admitted,—the defendants not having been parties nor privies to that suit.

The other specifications, which relate to the charge, must be sustained. The plaintiff's and defendants' second points define their respective contentions in the case. The plaintiff's point is:

"It appears by the official return that the Isaac Brennan tract was surveyed by George Woods in 1794; and therefore if marks made on the ground by the surveyor [Woods] in locating the tract, have been found, and their position identified, they must control the location of the tract."

The defendants' point is:

"The plaintiff, to make out a case, having given in evidence the return of survey made by William O'Keefe in 1808, and a patent founded on that return, he is concluded by the boundaries therein set out, as found on the ground."

The survey named in the latter point must, in the light of the defendants' attitude throughout the case, be understood as O'Keefe's. It was so understood by the court, otherwise it could not have been affirmed while the plaintiff's was, virtually, denied. If not so understood the points are harmonious. It thus appears that the plaintiff stands on a survey by Woods, described and marked by him; while the defendants stand, substantially at least, on one made by O'Keefe, with lines marked by him in 1808, though returned as Woods. The plaintiff's point should have been affirmed, without qualification, and the defendants' denied. The court affirmed the latter, thus instructing the jury (especially when the answer to the plaintiff's point is considered) that the return made by O'Keefe was of a survey run by himself, or that the jury might find it to be so, and that the plaintiff is concluded by the lines he established; and virtually denied the plaintiff's point, by saying, "It is affirmed if the jury find that Woods surveyed the land and his survey was adopted and returned by O'Keefe." The jury should not have been allowed to find that Woods did not make a survey, or if he did that O'Keefe might disregard it, and make another. The records of the land office show that Woods, and he alone, made the survey; and after the great lapse of time during which the land has been held under a patent issued thereon, the record must be treated as conclusive. *Drinker v. Holliday*, 2 Yeates, 87-89; *Porter v. Ferguson*, 3 Yeates, 60; *Norris v. Hamilton*, 7 Watts, 91-97. Indeed there is no evidence to the contrary—unless it be an inference from the marks of 1808; and who made these, and for what purpose, does not appear, except by conjecture. The only question for the jury was: Where are the lines of that survey? If O'Keefe ran and marked others in 1808, they are unimportant. Woods having exhausted the power conferred by the warrant, in this respect, O'Keefe's duty was confined to returning Woods' survey, as ascertained by examination of the record which the law required Woods to keep; and this is what his return shows he did. The case of *Smay v. Smith*, 1 Pen. & W. 1, cited by the defendants, is not inconsistent with this view; the facts and the questions there were different. As before stated the court's affirmance of the defendants' second point, and qualification of the plaintiff's, was a

virtual instruction that the jury might find that Woods did not survey the tract, and if it found he did, might also find that O'Keefe did not adopt this survey, but made another, which he returned. This error runs throughout the charge, and is the substance of all the complaints made of it (except the sixth, which is immaterial) and justifies them.

The judgment is therefore reversed.

BAGGALEY v. PITTSBURG & LAKE SUPERIOR IRON CO. et al.

(Circuit Court of Appeals, Sixth Circuit. December 12, 1898.)

No. 628.

1. CORPORATIONS—INTEREST IN LANDS—STANDING TIMBER.

The sale of standing timber is a sale of an interest in lands within a statute prohibiting a mining corporation from selling land without a vote of its stockholders.

2. SAME—STATUTE RELATING TO MINING COMPANIES—CONSTRUCTION.

The Michigan statute (How. Ann. St. § 4099) prohibiting mining corporations from alienating any part of their "mine works, real estate, or franchise," unless expressly authorized by the vote of three-fifths of the capital stock, "provided that the provisions of this section shall not apply to city or village lots, nor to land not required for mining purposes from which the timber has been removed, * * * which may be conveyed when authorized by a vote of a majority of the directors," was designed only to prevent such alienation of property as would disable the company from the conduct of its business as a mining company, and does not apply to a sale of nonmineral lands situated in another county, and at a distance from its mining property, nor to the sale of timber therefrom.

3. STATUTES—RULES OF CONSTRUCTION—PROVISOS.

While the ordinary office of a proviso is to except that which would otherwise be included in the act, the rule that it should be so construed is not of universal obligation, as the proviso may be used from excessive caution to prevent a possible misinterpretation of the act by including therein that which was not intended, and a court is required to give effect to the general intent of the act if it can be discovered from the act itself.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

This bill was filed by a stockholder to restrain his corporation, its officers and directors, from selling the company's lands, and also from selling or otherwise disposing of timber standing upon its lands, unless previously authorized thereto by a vote of three-fifths of the capital stock of said company. The corporation sought to be enjoined is a mining company organized under the provisions of chapter 123, How. Ann. St. Mich. The complainant below and appellant here owns or controls and represents more than two-fifths of the stock of the company. The remainder of the stock is owned or represented by the defendants and appellees Joseph and John C. Kirkpatrick, one of whom is the general manager and treasurer of the corporation and the other his assistant. The directors are five in number, three of whom were selected by the majority, or Kirkpatrick, interest, including both of themselves, and the other two were selected, under the cumulative voting system, by the appellant and his interest. Until 1889 the company owned and operated iron mines in Marquette county, Mich., and also owned large bodies of wild land in Marquette, Delta, and Menominee counties. In 1889 it made a sale of its iron mine, and since that time has conducted no sort of mining, smelting, or metal manufacturing business. The sale of the mines included some thousands of acres of its lands in the county of Marquette. The company continued, however, to be the owner of about 5,000 acres of land in Marquette

county and of about 18,000 acres of wild lands in Delta and Menominee counties. All of this land seems to have been acquired as mineral land, and that still held in Marquette county is yet classed as mineral land. The lands in Delta and Menominee counties do not seem to be such, and are not now regarded or classed as, mineral lands. The bill charged that the managers and directors, through the control and domination of the Kirkpatricks, as majority shareholders, were threatening to sell and dispose of the lands of the company, and were engaged regularly in selling the timber standing on said lands, particularly those within Delta and Menominee counties, and this without first obtaining the vote of three-fifths of the stockholders, and in violation of the power of the managers and directors of said company, and in violation of section 4099, How. Ann. St., which is in the following words: "No alienation, division, sale or mortgage of any, or any part of the mine works, real estate or franchise of any corporation mentioned in the first section of this act, shall have any force or effect, or pass any title thereto, or interest therein, unless expressly authorized by the vote of three-fifths of the capital stock of said company at some meeting of the stockholders called, and notified in accordance with the provisions of section nine of this act: provided, that the provisions of this section shall not apply to city or village lots, nor to land not required for mining purposes from which the timber has been removed, nor to rights of way and depot grounds for railroads, and rights of way for highways, which may be conveyed when authorized by a vote of a majority of the directors." Upon the pleadings and evidence the circuit court granted an injunction restraining the defendants or any of them from alienating "any lands of the company wherever situated," and from "selling, cutting, or removing any of the standing timber, except for actual use in the prosecution of the business of mining," from the lands in Marquette county, unless authorized thereto by a vote of three-fifths of the stock of said company. The court denied an injunction to restrain the selling of timber upon or from the lands in Delta and Menominee counties. The complainant, Ralph Baggailey, prayed and was allowed an appeal "from so much, and only so much, of the final decree" as denied an injunction restraining defendants from selling, cutting, or removing timber from the company's lands in Delta and Menominee counties.

A. C. Angell, for appellant.

Eugene E. Osborne, for appellees.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The sale of standing timber is a sale of an interest in land, and under the Michigan statute of frauds must be in writing. *Johnson v. Moore*, 28 Mich. 3; *Russell v. Myers*, 32 Mich. 522; *Williams v. Flood*, 63 Mich. 487, 30 N. W. 93. The contention, therefore, is that, if it was in excess of the authority of the officers and directors of this company to sell the lands of the company unless authorized thereto by a vote of three-fifths of the stock of the company, it was equally unauthorized to sell the timber standing thereon. But does the statute prohibit the sale of all lands or interests therein unless consented to by the requisite number of shareholders? or only such as are useful for mining purposes? To ascertain the purpose of this act we may look to the whole statute, including exceptions stated by way of a proviso or saving clause. The general purpose of the statute was to protect the interests of shareholders in mining companies. In *Beecher v. Mill Co.*, 45 Mich. 103, 7 N. W. 695, Mr. Justice Cooley interprets the act by saying: "It intends that the mining property shall not be conveyed away or mortgaged ex-

cept by their deliberate action." That the limitation is upon the alienation or incumbrance of "mining property," as distinguished from property not required in the conduct of the business for which the company was organized, is evident from the description of property to which the prohibition applies. The prohibition is against the alienation or incumbrance of "the mine works, real estate, or franchises." By "real estate" we must understand, from its association with "mine works" and "franchises," that species of "real estate" useful or valuable in connection with its "mine works" or "franchises." This interpretation is made more evident by the terms of the proviso, which expressly authorizes, by the vote of a majority of the directors, the sale of "city or village lots" and lands, "from which the timber has been removed," "not required for mining purposes."

We are not unmindful that the ordinary office of a proviso is to except out of an act that which would otherwise be included. But this rule must not be carried too far. Such clauses are often introduced from excessive caution and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended. The rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires a court to give effect to the general intent if that can be discovered within the four corners of the act. If such general intention would be defeated by construing the act as embracing everything of the same general description as those particularly excepted therefrom, an arbitrary application of the rule is not admissible. *Tinkham v. Tapscott*, 17 N. Y. 141. The purpose of this statute was to prevent such alienations or incumbrances of property as would disable the company from the conduct of its business as a mining company. To avoid all possible misinterpretations of this intent, the legislature, from an excess of caution, has seen fit to except out of the act a class of property which, by description, is not necessary or important to the integrity of the company's business. The lands of this company situated within Delta and Menominee counties are not mineral lands. They were probably bought in the belief that they contained minerals. No such minerals have been discovered. They are, therefore, lands not "required" for mining purposes. They are in counties quite distant from the county in which the company's remaining mineral land is located. The timber thereon is, therefore, of no possible value for mining uses or purposes. The sale of either timber or land not required or useful for mining purposes is not prohibited under any reasonable interpretation of this statute. The sale of either or both would in no degree cripple or disable the company from the conduct of its business. If a sale of land from which the timber has been cut, the land being nonmineral, and therefore "not required for mining purposes," is permissible, the sale of standing timber upon nonmineral lands, so remote from the "mine works" as to be useless for mining purposes, is equally admissible, when authorized by the directors. The error assigned must be overruled, and the decree affirmed, in so far as it is involved by this special appeal.

MITCHELL v. DOUGHERTY.

(Circuit Court of Appeals, Third Circuit. December 6, 1898.)

No. 18.

1. BUILDING CONTRACTS—PROVISION REQUIRING DECISION OF ARCHITECT.

A provision in a building contract requiring the submission of all questions thereunder to the architects, if valid, does not preclude a suit by one of the parties where it is shown that the architects refused to act when they should have done so.

2. SAME—LEGALITY—OUSTING JURISDICTION OF COURTS.

It is not competent for parties to a building contract to stipulate that any dispute arising between them, including questions not only as to the value or character of the work done, but also as to their legal rights under the contract, shall be submitted to the architects, whose decision shall be final; and such a stipulation will not oust the jurisdiction of the courts.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

R. C. Dale, for plaintiff in error.

J. Washington Logue and Pierce Archer, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and KIRKPATRICK, District Judge.

DALLAS, Circuit Judge. This case is before us on writ of error to the judgment of the circuit court for the Eastern district of Pennsylvania in an action by Frank A. Mitchell, plaintiff in error, against William R. Dougherty, defendant in error. Dougherty on May 15, 1896, had contracted with Archbishop Ryan for the erection of a certain building; and on May 22, 1896, the plaintiff, Mitchell, agreed with the defendant, Dougherty, to do a certain portion of the work, and furnish the materials therefor. Both contracts were in writing. The one between Archbishop Ryan and William R. Dougherty provided as follows:

"It is mutually agreed between the parties to this agreement that if any alterations, additions, or omissions are made in the work during its progress, the value of the same shall be decided by the engineers and architects, who shall make an equitable allowance therefor, and shall add the amount of said allowance to the contract price if the cost of the work has been increased, or shall deduct the amount from the contract price if the cost of the work has been lessened, as they, the said engineers and architects, may deem just and equitable. And it is mutually agreed and distinctly understood that the decision of the engineers and architects shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same; and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy, in law or otherwise, by virtue of said covenants, so that the decision of the said engineers and architects shall, in the nature of an award, be final and conclusive on the rights and claims of said parties."

The contract between the plaintiff and the defendant recited and provided as follows:

"Whereas, the said Dougherty has entered into articles of agreement with his Grace, Most Reverend P. J. Ryan, bearing date the fifteenth day of May, 1896, for the erection of certain brick buildings at Fatland, Pa., known as the 'R. C. Protectory,' according to certain plans and specifications therein re-

ferred to, which said articles of agreement, plans, and specifications are to be considered as if hereto attached, and made as much a part of this contract as if specially recited herein, all information concerning same being known to the said Frank A. Mitchell; and whereas, the said Frank A. Mitchell has agreed to subcontract with the said Dougherty for a certain portion of the work and materials necessary to be supplied by him in the erection and completion of the said building; and whereas, it has been agreed that, as to so much hereof as has been thus subcontracted for, the said Frank A. Mitchell, for the consideration hereinafter named, is, as between himself and the said Dougherty, to stand in the place of the latter, and to do everything in, about, and concerning the same as is provided in said Dougherty's contract with said Archbishop P. J. Ryan, subject to all its terms and restrictions, so that the said Dougherty shall be indemnified and saved harmless from all loss, costs, and charges in and about said portion of work and materials: Now, this agreement witnesseth that the said parties do hereby, in consideration of the premises, and of the mutual covenants herein contained, covenant, promise, and agree to and with each other, each binding himself, his heirs, executors, and administrators and assigns, to the other, his heirs, executors, administrators, or assigns, as follows: (1) The said Frank A. Mitchell further agrees to furnish all the labor and material necessary to complete all the roof work, galvanized iron, copper, tile, and tin, etc., in strict accordance with plan and specifications prepared and shown by Wilson Bros. & Co., and to their entire satisfaction. * * * The said Archbishop P. J. Ryan having the right to add to, change, or modify any part of the plans of aforesaid building during its progress, the said Frank A. Mitchell will do what shall thus in the above-specified matters be entailed upon the said Dougherty; and any such modifications shall not affect this contract, in regard to the considerations, the time for completion, or other matter, unless a specified agreement making provision for the same shall be reduced to writing, and signed by the parties hereto."

The plaintiff entered upon the work which he had undertaken to perform, but after he had been engaged in it for about six weeks he was required by the defendant to proceed no further until the owner should decide whether a sort of tile different from that named in the contract would not be used. The plaintiff was also requested to present an estimate of the cost of making the contemplated substitution, and in January, 1897, he did present such an estimate. The matter was then held under consideration until March 31, 1897, when the defendant addressed to the plaintiff a letter as follows:

"Philadelphia, March 31, 1897.

"Mr. Frank A. Mitchell, 104 West Fifth Street, Wilmington, Del.—Dear Sir: The architects have declined to consider at this time the question of what allowance is to be made for the placing of the Celadon tile, instead of the Ludowici, upon the Protectors buildings at Fatland. As matters present themselves to me to-day, I find the condition to be that the change will have to be made immediately, and the work prosecuted. While I have received from them no direct statement that they will not pass upon the claim, they have intimated that the future will be the proper time for them to consider it, and are now engaged in getting estimates from other people for the purpose of having some one else do the work. It is necessary, therefore, that the work of laying the Celadon tile should be commenced at once. The Celadon people,—having knowledge for some time back, from Wilson Bros., that their tile was to be used,—I believe, are in shape to make an immediate shipment. I have therefore ordered to-night that some tile be shipped, so as to prevent Wilson Bros., if possible, from taking the work out of our hands. The position in the matter is just this: That what, if anything, is to be allowed for the change, is to be fixed by the architects in the future. What I get, you are to receive; and, in presenting your claim to them, I let be distinctly known that, while adopting it as my claim, I did so as it was the amount you stated it would take to make the change. I have ordered from the Celadon people, feeling that in this matter I am protecting your in-

terests as well as my own, because, as you know, your contract places you in your dealings with me in the position that I occupy with the owner.

"Yours, truly,

William R. Dougherty."

Plaintiff declined to proceed in accordance with the proposed substitution, without an agreement making provision for the same, and in this he was clearly justified by the express terms of his contract. The court below appears to have so understood the matter at the time of the trial, for the learned judge charged that:

"If the plaintiff was prevented going on to complete the work by being required to substitute a different description of tile, and the owner of the property declining to agree upon the cost of this substitution, then the plaintiff was justified in discontinuing the work, and was not required to proceed until the cost had been agreed upon, and the agreement reduced to writing, because, if he had thus proceeded, he would have been precluded by the strict terms of his contract from recovering anything on that account. * * * It seems an entirely plain and unavoidable deduction from the evidence that the plaintiff was requested to discontinue the work temporarily while the subject of introducing a different tile was under consideration; that the different tile was afterwards substituted by the builder for the one named in the contract, and that the plaintiff was entitled to make a proposal of the cost of this change; that he complied with it; that the only answer, so far as the court remembers, that he received to this proposal was that the architects, to whom the subject had been referred, were not willing to pass upon that question then, but that the work should go on, and it would be determined in the future. Now, the court says to you that, if that is the fact, it was a justification to the plaintiff for discontinuing the work. Then, when the work was subsequently put in the hands of another for completion, he had no further concern with it. You will say, however, how that question of fact should be decided."

Thus, it appears that it was left to the jury, with proper instructions concerning the requirements of the contract, to say whether the plaintiff had not done all that it was incumbent upon him to do to obtain the decision of the architects; and the jury having found, as must now be assumed, that his failure to secure such a decision resulted wholly from the refusal of the architects to act when they should have acted, we think, aside and apart from the question presently to be considered, that the plaintiff ought not to have been turned out of court merely because a decision by the architects had not been procured.

The court below, notwithstanding the verdict, entered judgment in favor of the defendant upon a point which had been reserved upon the trial, as follows:

"That the plaintiff is bound by the provisions of the contract entered into between Dougherty and the owners, waiving suits at law in reference to any dispute arising out of the contract, and he is only entitled to recover upon an award made by the architects. There being no evidence that such an award has been made, or any reference by plaintiff to architects, the verdict must be for the defendant."

The learned judge, in sustaining this point, held that the entire controversy which arose from the dismissal of the plaintiff, including, of course, the dispute as to whether that dismissal was wrongful, was for arbitration by the architects under the reference clause of the contract, the validity of which he upheld; and the important question in the cause, therefore, is, does this ruling comport with the law? It is to be observed that this was an action, not to recover for work done under the contract, but for damages for the defendant's breach in pre-

venting the plaintiff from proceeding under it. We have no doubt that the terms of the clause under consideration are quite broad enough to include this demand, but we cannot agree that it is competent for the parties to any contract, by any stipulation which they may make a part of it, to oust the jurisdiction of the courts, and substitute for them an extra-legal tribunal of their own creation, with power to finally and conclusively decide such a matter. It is not necessary to question, and we do not question, the right of the parties to such a contract as this to set aside the rules of evidence established by law, by providing that the estimate, computation, or appraisal of any one whom they may see proper to select shall be exclusively received to prove the extent or character of work done, and the sum to be paid therefor; but where, as here, they undertake to waive all right of action respecting "any dispute" which may arise, they go much further, and seek to accomplish what the law forbids,—the complete abrogation of the authority which it has conferred upon the courts.

The cases cited by the court below, with the exception of one in a circuit court of the United States, to which we will refer further on, are all Pennsylvania cases; and it must be conceded that they lend some support to its conclusion, although it would, we think, be difficult to deduce from the decisions in that state any distinctly established rule upon the subject. *Mentz v. Insurance Co.*, 79 Pa. St. 478, does not appear to have been called to the attention of the learned judge, and that case, at least, appears to be in harmony with our understanding of the law. There the action was brought to recover for loss from fire under a policy of insurance which contained a condition as follows:

"(8) In case any difference or dispute shall arise between the assured and this company touching the amount of any loss or damage sustained by him, such difference shall be submitted to the judgment of arbitrators, one to be appointed by each party, with power to select a third in case of disagreement, whose decision thereupon shall be final and conclusive; and no action, suit, or proceedings at law or in equity shall be maintained on this policy, unless the amount of loss or damage, in case of difference or dispute, shall be first thus ascertained."

The trial judge entered a judgment of nonsuit, upon the ground that the above condition required the assured to submit to a reference; and this judgment was reversed in an opinion by Mr. Justice Sharswood, from which we extract the following:

"There can be no doubt that, if this case stood upon a general arbitration clause in the policy alone, it would fall within the principle settled by this court, conformably to all the previous English authorities, in *Gray v. Wilson*, 4 Watts, 41, *Snodgrass v. Gavit*, 28 Pa. St. 224, and *Lauman v. Young*, 31 Pa. St. 310,—that it is not in the power of the parties to a contract to oust the courts of their jurisdiction. The cases in which the certificate or approbation of any particular person—as the engineer of a railroad company—to the amount of a claim is made a condition precedent to an action rest upon entirely different principles. He is not created a judge or arbitrator of law and facts, but simply an appraiser of work done. *Navigation Co. v. Fenlon*, 4 Watts & S. 205; *Lauman v. Young*, 31 Pa. St. 306. * * * It is not in the power of parties thus to oust the courts of their general jurisdiction, any more than they have to add to a personal covenant, that they are not to be responsible for a breach of it. *Furnivall v. Coombes*, 5 Man. & G. 736. The supreme court of the United States have recognized the soundness of this general principle in *Insurance Co. v. Morse*, 20 Wall. 445, in which they held that an agreement by a foreign insurance company, in conformity with a state statute,

that, if sued in a state court, they would not remove the suit into the federal court, was invalid. The contention, however, here, is that the special provision added in this policy to the arbitration clause distinguishes this case from those cited. It declares that 'no action, suit, or proceedings at law or in equity shall be maintained on this policy, unless the amount of loss or dispute as aforesaid shall have been first thus ascertained.' If, however, it was not in the power of the parties to oust the courts of their general jurisdiction by such an agreement, that clause does not help them. Had a general arbitration clause been valid, it would have been a condition precedent to an action, of itself. The provision in question is but the expression of that which was implied. We are not to be understood as holding that this provision of the policy, which is special, not general, is entirely without effect. By its terms it was confined to any difference or dispute that should arise between the insured and the company touching the amount of any loss or damage. But then it was incumbent on the defendants below, in order to avail themselves of it, to show that a dispute had arisen touching the amount of the loss. In other words, they must show that they admitted the validity of the policy, and their liability under it, and that the only question was as to the extent of the loss."

The case of *Fox v. Hempfield*, 14 Leg. Int. 148, Fed. Cas. No. 5,010, is the circuit court case we have mentioned as having been referred to by the court below. It certainly does maintain the position taken by that court, but, notwithstanding the fact that it was decided by a judge of the highest eminence, we are constrained to dissent from it. But two cases were cited in his opinion. One of these is the Pennsylvania case of *Navigation Co. v. Fenlon*, 4 Watts & S. 205; and the remarks of the court in *Fox v. Hempfield* respecting the usefulness of a stipulation for arbitrament of disputes was evidently suggested by some of the language of the opinion in that case. It was there said:

"Experience, which is the best test, has shown its beneficial effects, and, indeed, its absolute necessity; for, without it, it is next to a certainty the company would be constantly harassed by vexatious and ruinous litigation. In any contract of this kind, to avoid unpleasant and unprofitable controversies, it has been found expedient at least to clothe the engineer with great power in relation to the conduct of the contractors and the manner of performing work. * * * An engineer employed by the company is perfectly acquainted with all the details of the work," etc.

Now, although there is much in that opinion to give color to the supposition that the learned judge by whom it was delivered intended to maintain the validity of a provision for general reference, yet, upon careful consideration of it as a whole, and from the part above quoted, we think it apparent that the question which the court really had in mind, and to which its reasoning should be related, was that which is stated upon page 210 of the report, thus:

"The question then recurs, by whom is the compensation of the plaintiffs to be estimated?"

As applied to that question, the opinion might well be accepted; but we think that in *Fox v. Hempfield* the mistake was made of applying it to a provision, the effect of which was to absolutely oust the jurisdiction of the courts, and not merely to prescribe by whom compensation should be estimated. The other case referred to in *Fox v. Hempfield* is that of *Scott v. Avery*, 5 H. L. Cas. 827, but the learned judge must have been in some manner misled as to the ground upon which the judgment in that case was rested. As was said in *Mentz v. Insurance Co.*, *supra*:

"The majority of the opinions there went upon the ground that it was a special, not a general, arbitration which was intended. The power to oust the courts of their general jurisdiction was certainly repudiated."

Moreover, although the decision in *Fox v. Hempfield* was made in 1857, we do not find that it has been referred to in any of the later deliverances of the courts of the United States. It cannot be reconciled with them.

Trott v. Insurance Co., 7 Cliff. 439, 24 Fed. Cas. 215, was a suit upon a policy of insurance, in which Mr. Justice Clifford, at circuit, overruled a plea which set up that "it was the duty of the plaintiff, mutually with the defendants, to have agreed upon and chosen referees to determine upon the difference and dispute," as was provided for by the by-laws. In the opinion of the court it was said:

"Nothing, therefore, can be more certain than that the effect of the by-law, if it be valid, is to oust the jurisdiction of the courts. Every difference or dispute must be referred to and determined by referees, and the policy expressly provides that their award in writing shall be conclusive and binding on all the parties. To say that a suit may afterwards be brought upon the award is not a satisfactory answer to this objection. Having come to this conclusion, the only remaining inquiry is whether the by-law is valid, and I am of the opinion that it is not. Judge Story, in the case of *Tobey v. Bristol Co.*, Fed. Cas. No. 14,065, divided the cases upon this subject into two classes: One where an agreement to refer to arbitration was set up as a defense to a suit either at law or in equity; and the other, where the party, as plaintiff, sought to enforce such an agreement by a bill in equity for a specific performance. Both classes, says the learned judge, have shared the same fate. Courts of justice have refused to allow the former as a bar or defense against the suit, and have declined to enforce the latter, as ill founded in point of jurisdiction. * * * Text writers, both English and American, have long regarded it as a settled principle of law that the parties to a contract cannot oust the jurisdiction of the courts by any agreement to submit the matters in difference to arbitration. 2 Arn. Ins. 1245; 2 Story, Eq. Jur. § 1457; 2 Pars. Mar. Law, 483. Many additional decisions and authorities might be added to this list, where the same unqualified doctrine is laid down and enforced, and I am not aware that the soundness of the rule established in the leading case has ever been questioned by an American court. * * * All things considered, I am of the opinion that the rule is stated by Coleridge, J., in *Avery v. Scott*, 8 Exch. 497, overruling *Scott v. Avery*, Id. 487, in the same volume. He says there is no dispute as to the principle. Both sides admit that it is not unlawful for parties to agree to impose a condition precedent with respect to the mode of settling the amount of damage, or the time for payment, or any matters of that kind which do not go to the root of the action. On the other hand, it is conceded that any agreement which is to prevent the suffering party from coming into a court of law, or, in other words, which ousts the courts of their jurisdiction, cannot be supported. That qualification to the general doctrine as stated in the earlier cases was admitted in *Hill v. More*, 40 Me. 515, and I am inclined to think it is one that ought to be sustained. But the present case is not within that qualification, and consequently the demurrer is sustained, and the plea adjudged bad."

In *Insurance Co. v. Morse*, 20 Wall. 451, the court cited a number of authorities to show that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void," and especially referred to *Scott v. Avery*, 5 H. L. Cas. 811; Story, Eq. Jur. § 670; and *Stephenson v. Insurance Co.*, 54 Me. 55, as follows:

"In *Scott v. Avery* [one of the cases] the lord chancellor says: 'There is no doubt of the general principle that parties cannot by contract oust the ordinary courts of their jurisdiction. That has been decided in many cases.' * * * And the principle, Mr. Justice Story, in his *Commentaries on Equity Juris-*

prudence, says, is applicable in courts of equity as well as in courts of law. 'And where the stipulation, though not against the policy of the law, yet is an effort to devert the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not, any more than a court of law, interfere to enforce the agreement, but it will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulations, if they were specifically enforced.' In *Stephenson v. Insurance Co.*, 54 Me. 55, the court say: 'While parties may impose, as condition precedent to applications to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law. The law, and not the contract, prescribes the remedy; and parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case, than they have to provide a remedy prohibited by law. Such stipulations are repugnant to the rest of the contract, and assume to devert courts of their established jurisdictions. As conditions precedent to an appeal to the courts, they are void.'"

In *Guarantee Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512, where a decree of a circuit court dismissing a bill for foreclosure of a corporation mortgage was reversed, the supreme court said:

"It is true, there is a subsequent provision in the deed of trust to the effect that neither the whole nor any part of the premises mortgaged shall be sold, under proceedings either at law or equity, for the recovery of the principal or interest of the bonds; it being the intention and agreement of the parties that the mode of sale provided by the mortgage 'shall be exclusive of all others.' This clause, however, is open to the objection of attempting to provide against a remedy in the ordinary course of judicial proceedings, and oust the jurisdiction of the courts, which, as is settled by the uniform current of authority, cannot be done. *Hope v. Society*, 4 Ch. Div. 327; *Edwards v. Society*, 1 Q. B. Div. 563; *Horton v. Sayer*, 4 Hurl. & N. 643; *Scott v. Avery*, 8 Exch. 487, 5 H. L. Cas. 811; *Thompson v. Charnock*, 8 Term R. 139; *Mitchell v. Harris*, 2 Ves. Jr. 129; *Tobey v. Bristol Co.*, 3 Story, 800, Fed. Cas. No. 14,065; *Noyes v. Marsh*, 123 Mass. 286; *King v. Howard*, 27 Mo. 21; *Conner v. Drake*, 1 Ohio St. 166; *Trott v. Insurance Co.*, 1 Cliff. 439, Fed. Cas. No. 14,189; 2 Story, Eq. Jur. 1457."

See, also, *Tobey v. Bristol Co.*, 3 Story, 800, 23 Fed. Cas. 1313, and *The Excelsior*, 123 U. S. 40-51, 8 Sup. Ct. 33.

We have not felt called upon to discuss in detail the several Pennsylvania cases which have been urged upon our attention by the learned counsel for the defendant in error. The question before us is not as to the enforcement of the contract in accordance with the law of the place where it was made, but is as to whether a court of the United States should, because of the parties' agreement in advance to abstain from invoking its jurisdiction, refuse to enforce the contract at all. Upon this question the decisions of the supreme court of the United States are controlling, and they admit of but one conclusion. The judgment of the circuit court is reversed, and the cause will be remanded to that court, with direction to enter judgment for the plaintiff on the verdict.

MANHATTAN LIFE INS. CO. v. McKOWN.

(Circuit Court of Appeals, Third Circuit. December 15, 1898.)

No. 44.

SET-OFF—ACTION ON LIFE INSURANCE POLICY—JUDGMENT AGAINST INSURED.

In an action by an executrix on a policy of insurance on the life of her testator, payable to his executors, administrators, or assigns, the defendant cannot set off a judgment in its favor against the decedent. In such case the plaintiff does not sue in her official capacity as for a debt due the decedent, who had no claim against the defendant, but as the payee named in the policy, and it is immaterial that the proceeds, when recovered, will go to the distributees of the estate.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

This was an action by Elizabeth C. McKown, executrix of James C. McKown, deceased, for the use of Elizabeth C. McKown, against the Manhattan Life Insurance Company. From a judgment for plaintiff, defendant brings error.

M. A. Woodward, for plaintiff in error.

Thomas Patterson, for defendant in error.

Before DALLAS, Circuit Judge, and BUTLER and BRADFORD, District Judges.

BUTLER, District Judge. The suit is on a policy of insurance issued by the defendant to James C. McKown for \$10,000, payable to his executors, administrators or assigns, at the expiration of 90 days after proof of his death. The only defense is set-off. The defendant having obtained judgment against James C. McKown in his lifetime, for \$38,000, proposed to set it off against the plaintiff's demand. This the court refused to permit; and the defendant assigns the refusal as error. We think the court was right; and that the reasons given for its ruling, and the authorities cited, in dismissing a rule for new trial, sufficiently justify it. Set-off is only permissible where the debts involved, and the rights of the parties respecting them, are mutual. The defendant's claim must constitute a cause of action against the plaintiff, at the date of suit. Where the plaintiff sues on the rights of another, as assignee, or legal representative of a decedent, such mutuality exists if the debt proposed to be set off was owing by the assignor when the assignee's rights attached, or was contracted by the deceased, and due at the time stated. In the case before us the suit is by an executrix, and the debt offered was owing by the decedent and due in his lifetime. The plaintiff does not, however, sue in her official capacity, as for a debt due to the deceased, but as payee named in the policy. She is the creditor under the contract. McKown had no claim against the company; it owed him nothing. The situation is the same as if the policy had been in favor of his wife, his child, or a trustee for his creditors. It is not material that the money when recovered will go to the distributees of his estate; that is a consequence of the contract, which the parties chose to make.

The judgment is therefore affirmed.

PATTERSON v. THOMPSON et al.

(Circuit Court, D. Oregon. December 3, 1898.)

No. 2,459.

1. LIMITATION OF ACTIONS—COMMENCEMENT OF ACTION—STATUTE OF OREGON.

The liability of directors of a bank, under Hill's Ann. Laws Or. § 3231, which makes such directors who vote for the declaration of a dividend when the bank is insolvent "jointly and severally liable for the debts of the corporation then existing or incurred while they remain in office," is penal in its nature, and the directors are not, as to such liability, "joint contractors or united in interest," within the meaning of section 14 of such Laws, providing that an action shall be deemed commenced as to each defendant when the complaint is filed and the summons served on him or on a co-defendant, who is a joint contractor or united in interest with him; hence an action to enforce such liability is not commenced as to a particular defendant until the service of summons on him.

2. SAME—DEMURRER—FACTS APPEARING ON FACE OF COMPLAINT.

Under Hill's Ann. Laws Or. § 67, which authorizes a demurrer when it appears on the face of the complaint that the action has not been commenced within the time limited by the Code, it being further provided by section 14 that the action shall be deemed commenced when the complaint is filed and the summons served, the complaint and writ must be read together, and what appears from the two will be deemed, for the purposes of such demurrer, to appear on the face of the complaint.

On Demurrer to Complaint.

U. S. G. Marquam, for plaintiff.

Cyrus A. Dolph, for defendants.

GILBERT, Circuit Judge. Walter F. Burrell, one of the defendants, demurs to the complaint for the reason that it appears upon the face thereof that as to him the action was not commenced within the time limited by the Code of Civil Procedure of the State of Oregon. The action is brought to enforce the statutory liability which is imposed upon directors of banking corporations in cases where they have declared dividends of the funds of insolvent banks. Hill's Ann. Laws Or. § 3231. In the case of *Patterson v. Thompson*, 86 Fed. 85, recently decided in this court, it was held that the statutory liability is penal in its nature, and that the three-years statute of limitations applies. It is alleged in the complaint in the present case that on May 10, 1892, the plaintiff deposited \$978.33 with the Portland Savings Bank, of which bank the defendants were directors, and for which sum the bank gave him a certificate of deposit payable on May 1, 1895. The complaint was filed on March 26, 1898. On that day service of the complaint and summons was made upon one of the defendants, but summons was not issued against the defendant Burrell until June 16, 1898, and was not served upon him until June 22, 1898. The Annotated Laws of Oregon (section 67) provide that a defendant may demur to the complaint when it appears upon the face thereof "that the action has not been commenced within the time limited by this Code." Section 14 provides as follows: "An action shall be deemed commenced as to each defendant when the complaint is filed and the summons served on him, or on a co-defendant who is a joint contractor or otherwise united in interest with him." It is clear that the de-

fendants in this case are not joint contractors or united in interest. Their liability is penal, and is created by a statute which declares that the directors who vote for the illegal dividend "shall be jointly and severally liable for the debts of the corporation then existing or incurred while they remain in office." Section 3231. The plaintiff contends, however, that the defendant cannot avail himself of the statute of limitations on demurrer, for the reason that it does not appear upon the face of the complaint that the action was not brought within the period limited by the statute. The complaint does show, however, the date when the cause of action accrued. It is not necessary to decide whether the action could have been commenced before the date when the deposit fell due. It is clear that upon that date, if not before, the cause of action had accrued. In order to determine the date of the commencement of an action with reference to the statute of limitations, it is necessary to know at what date the summons was served. The date appears upon the summons. It is there shown that not only was the summons not served, but that it was not issued, until after three years from May 1, 1895. The writ and the complaint must be read together, and what appears upon the complaint and the writ will, for this purpose, be deemed to appear on the face of the complaint. *Lambert v. Manufacturing Co.*, 42 W. Va. 813, 26 S. E. 431. The demurrer must be sustained.

In re LEONG YOUK TONG.

(Circuit Court, D. Oregon. December 3, 1898.)

No. 2,507.

ALIENS—EXCLUSION OF CHINESE—REVIEW OF DECISION OF COLLECTOR.

Where an alien has been denied admission to the United States under the Chinese exclusion act, upon grounds therein prescribed, and has exercised his right of appeal to the secretary of the treasury, by whom the decision of the collector has been affirmed, a court is without power on habeas corpus to review such decision on the ground of irregularity in the taking of the testimony by the collector, or his refusal to receive cumulative evidence offered by the petitioner. The manner of conducting the hearing is not prescribed by the statute, and the discretion of the collector in that regard is not subject to control by the courts.

This is a hearing on a writ of habeas corpus.

E. P. Mays and Charles F. Lord, for petitioner.
John H. Hall, for the United States.

GILBERT, Circuit Judge. A writ of habeas corpus was issued on behalf of Leong Youk Tong upon a petition which alleged that he was unlawfully deprived of his liberty under authority of an order made by T. J. Black, collector of customs for the port of Portland. It was alleged in the petition that the petitioner was and had been a merchant at Portland, Or., since the year 1891; that in the year 1897 he went to China upon a business trip, and that upon his return to the port of Portland, in July, 1898, he applied for readmission, and

produced before the collector two white witnesses to prove the fact that he was such merchant; that said witnesses were examined, and so testified; that the petitioner offered other reputable white witnesses to prove the same fact; that the collector refused to examine the other witnesses, upon the ground, as then stated by him, that there was already sufficient proof that the petitioner was a merchant; that one B. F. Jossey, a Chinese inspector of the treasury department, objected before the collector to the right of the petitioner to land, and caused the hearing to be continued to the following day; that, upon the following day, the petitioner, by his counsel, appeared before the collector and the said inspector; that no further testimony was taken, but that thereupon the said inspector stated that the petitioner was denied the right to land, which statement the collector agreed to, but neither he nor the inspector made known the ground of said decision. The evidence upon the hearing on the writ fully sustains these allegations so far as they go. It appears that, two days before the application came on for hearing, the said Jossey had presented to the collector his report upon the case, in which he reported adversely to the petitioner's right to land. On the day of the hearing, the collector heard the evidence of two reputable white witnesses, to the effect that the petitioner, to their knowledge, had been, and was, a merchant in the city of Portland, carrying on business in his own name, and doing no manual labor other than such as was necessary in conducting his business. On the following day, the collector and the inspector, Jossey, who seems to have usurped and exercised the functions of the collector, rejected the testimony of three reputable white witnesses who were offered to corroborate the evidence of the first two witnesses, and announced to the petitioner's counsel that they were convinced that the petitioner was a merchant, but that he would be denied the right of admission into the United States upon other grounds. Up to this time no testimony whatever had been taken before the collector except that of the two witnesses above referred to. On the same day, the Chinese inspector and the collector informed the petitioner's counsel that the reason why the petitioner was rejected was that his store had been used for gambling and as a house of ill fame. After the decision had been announced, and the petitioner's counsel had left, the collector proceeded to take the depositions of two witnesses, adverse to the petitioner, who deposed to the effect that the petitioner's stock in trade had been very small, and was only for a blind, and that he had been engaged in keeping a gambling house and a house of prostitution. The petitioner appealed to the secretary of the treasury from the decision, and procured and forwarded to the secretary the affidavits of the three witnesses whose testimony had been rejected by the collector, and acquainted the secretary with the above-detailed facts which occurred at the hearing. The decision of the collector was affirmed on the appeal.

By the law of August 18, 1894, it is provided as follows:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury."

If there has been a decision in this case such as the statute contemplates, the decision is final, and can be reversed only on appeal to the secretary of the treasury. This court has no authority, by writ of habeas corpus or otherwise, to review it. *Lem Moon Sing v. U. S.*, 158 U. S. 538, 15 Sup. Ct. 967. The courts have interfered only in cases where the applicant for admission was about to be deported under an order which denied him a hearing, or denied his right of appeal (*In re Gottfried*, 89 Fed. 9; *In re Gin Fung*, 89 Fed. 153; *In re Monaco*, 86 Fed. 117); and in cases where he has been denied the right to land for reasons which the law does not recognize as ground for his exclusion (*In re Kornmehl*, 87 Fed. 314). If, in this case, the collector had in fact decided, as was indicated in his verbal statement to the petitioner's counsel, that the petitioner was a merchant, and, as such, entitled to admission into the United States, but that he was denied admission for some other reason not connected with his status as a merchant, and not by statute or treaty made a ground of exclusion, the order of deportation would undoubtedly be void. Such appeared to be the facts as they were set forth in the petition for the writ. But the evidence shows that, after announcing his decision, the collector proceeded to take further evidence which tended to show that the petitioner was not in reality a merchant, but that he had carried on a pretended business as a merchant as a blind, and with the object of remaining within the United States and giving his attention to other occupations. Whether the evidence was sufficient to sustain that conclusion it is unnecessary to consider. This court has no jurisdiction to determine the question whether or not the petitioner offered to the collector the proof that he was a merchant. The method to be followed by the collector in arriving at his decision is not prescribed by law. He was not obliged to hear, or to permit the presence of, counsel for the petitioner. He was not prohibited from announcing a decision, and thereafter taking, in the form of depositions, the hearsay evidence on which he had arrived at his conclusion. He might, if he chose, refuse to hear cumulative testimony upon any point. He was not required to conform his proceedings to what is known as "due process of law." Such is the doctrine of *Nishimura Ekiu's Case*, 142 U. S. 651, 12 Sup. Ct. 336. Referring to that case in a subsequent decision, the supreme court declared its purport to be that if congress intrusted the final decision of the facts upon which an alien's right to land was made to depend, to an executive officer; "his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its efficiency." *Fong Yue Ting v. U. S.*, 149 U. S. 698, 713, 13 Sup. Ct. 1016. The testimony which was offered in this case by the petitioner's counsel, and rejected by the collector, was thereafter presented to the secretary of the treasury on the appeal. It follows from the affirmation of the collector's decision by the secretary either that the purport of such evidence was not deemed sufficient to reverse the decision of the collector, or that its exclusion by him was not held erroneous. The petitioner must be remanded to his custody.

In re BRUSS-RITTER CO.

(District Court, E. D. Wisconsin. December 10, 1898.)

1. BANKRUPTCY—EFFECT OF BANKRUPTCY ACT ON STATE INSOLVENCY LAWS.

The enactment by congress of a national bankruptcy act suspends the operation of state insolvency laws from the time of such enactment, subject only to such limitations as may be prescribed in the bankruptcy act.

2. SAME—TIME OF TAKING EFFECT.

In regard to its suspensive effect on state insolvency laws, the national bankruptcy act of 1898, providing that "this act shall go into full force and effect upon its passage: provided, however, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof," and that "proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it," took effect, as to involuntary proceedings, from the date of its approval, July 1, 1898, and not from November 1, 1898, when petitions in such cases might first be filed.

3. SAME.

The postponement of the right to file petitions in involuntary cases until four months after the passage of the bankruptcy act did not authorize state courts, in the interval, to take jurisdiction of proceedings begun under state insolvency laws, being a mere regulation of procedure, and not a denial or impairment of the rights of suitors.

4. SAME—JURISDICTION OF COURTS OF BANKRUPTCY.

A district court of the United States, sitting in bankruptcy, has jurisdiction to entertain a petition in involuntary proceedings against a corporation amenable to the law, and to appoint a temporary receiver of its effects, notwithstanding the fact that proceedings had been begun against the same corporation in a state court, under a statute of the state, after the passage of the national bankruptcy law, but before the date when involuntary petitions under it could be filed, founded on alleged insolvency and fraud of the defendant, and seeking to take possession of its assets for the same purposes involved in the bankruptcy proceedings, and including an application for the appointment of a receiver.

In Bankruptcy. On motion to dismiss petition for want of jurisdiction.

C. W. Briggs and O'Connor, Hammel & Schmitz, for the motion.
McCabe & Dahlman, opposed.

SEAMAN, District Judge. The petition by five creditors states a prima facie cause within the provisions of the recent act of congress for an adjudication of involuntary bankruptcy against the Bruss-Ritter Company as an insolvent corporation of Wisconsin. The petition was filed November 4, 1898, and on November 11, 1898, upon petition showing cause therefor, a receiver of the effects of said corporation was appointed by order of this court. The motion to dismiss is founded solely upon the contention that the bankruptcy act of July 1, 1898, having postponed the filing of any petition for involuntary bankruptcy until November 1, 1898, was inoperative in the case at bar, because an action was commenced in the superior court of Milwaukee county on October 27, 1898, founded upon alleged insolvency and fraud, to take possession of the assets of the corporation for the same purposes involved in the bankruptcy proceedings, pursuant to provisions of the Wisconsin statute, which action was pending when this petition was filed,

including an application for the appointment of a receiver. The power of congress to enact a general bankruptcy statute is secured by constitutional provision. In the absence of such congressional enactment, the states are free to provide for insolvency relief of limited extent, but when congress exercises its authority by a general enactment all state action is suspended from such time and subject only to such limitations as may be prescribed in the act. *Tua v. Carriere*, 117 U. S. 201, 209, 6 Sup. Ct. 565. As remarked in *Platt v. Archer*, 9 Blatchf. 559, Fed. Cas. No. 11,213, this authority of congress "is paramount and exclusive, and so is the jurisdiction of the district court thereunder." The doctrine thus stated is well established, and is unquestioned upon this motion, except that it is contended (1) that the act of July 1, 1898, was not intended to go into effect, in cases of involuntary bankruptcy, until November 1st, and (2) even if so intended, that no remedy was provided for the intervening four months, leaving the state enactments unimpaired, so that in actions commenced meantime for their enforcement jurisdiction is retained of the subject-matter without interference by proceedings under the bankruptcy act.

1. The intention of the act to have general force and effect from the date of passage is expressly declared in the concluding paragraphs a and b, as follows:

"a. This act shall go into full force and effect upon its passage: provided, however, that no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

"b. Proceedings commenced under state insolvency laws before the passage of this act shall not be affected by it."

The date of passage is also referred to in defining acts of bankruptcy in section 67, and there is no provision which gives countenance to, or even suggests, the legislative intent to postpone the force of the enactment, unless the postponement of time for filing petitions must be taken as conclusive of such purpose. Decisions interpreting the bankruptcy act of 1867 are cited as supporting the latter view. *Judd v. Ives*, 4 Metc. (Mass.) 401; *Day v. Bardwell*, 97 Mass. 246; *Lothrop v. Foundry Co.*, 128 Mass. 123; *Martin v. Berry*, 37 Cal. 208; and cases noted in last edition of *Bump, Bankr.* 98. These authorities are clearly inapplicable, as there is no parallel in the terms of that act with those here in question. Section 50 of the act of 1867 provided:

"That this act shall commence and take effect, as to the appointment of officers created thereby and the promulgation of rules and general orders, from and after the date of its approval: provided, that no petition or other proceeding under this act shall be filed, received or commenced before the first day of June," 1867.

The terms were not clear in stating the time when the act should have full force, but were quite clear in naming alone for its immediate effect the preliminary appointments, rules, and orders, and then providing that no proceedings should be instituted before June 1st. Courts differed in fixing the time of its going into general effect, and it is unnecessary to discuss here the correctness of one view or the other. That which was upheld in the cases cited, namely, that it was not operative to suspend state provisions until June 1st, may well be assumed, for the purposes of this motion, as the sound interpretation. But there is

no such ambiguity in the terms of the present act. The intention that "it shall go into full force and effect upon its passage" is well expressed, leaving no room for invoking the canons of interpretation applied to the former act; and to the extent that the actual intent of congress controls I am of opinion that the act is operative from July 1, 1898. This view is well fortified by a decision of the supreme judicial court of Massachusetts, filed November 3, 1898, in *Manufacturing Co. v. Hamilton*, 51 N. E. 529, cited by counsel for petitioners, in which the identical questions urged upon the present motion were directly involved and determined. After pointing out the distinction from the terms of the earlier statutes, especially that of 1867, and the cases thereunder, it is held that the change was manifestly intentional, and within the power of congress, and was effective to supersede the insolvency laws of the commonwealth from the date of its passage so far "as to deprive the courts [of the state] of jurisdiction to entertain petitions for the commencement of insolvency proceedings filed after July 1, 1898." The court, speaking unanimously through Knowlton, J., concludes the opinion as follows:

"These various provisions affecting the rights and conduct of debtors and creditors are different from those previously existing in most of the states, and perhaps different from those found in the laws of any state; and they supersede all conflicting provisions. The only limitation upon the full and complete operation of the act upon its passage is that the right to begin proceedings is postponed one month in the case of voluntary petitions and four months in the case of involuntary petitions. Whenever the proceedings are commenced, the conduct of the parties after the passage of the act is to be tested by its requirements. The only saving clause affecting the jurisdiction of state courts provides for cases commenced in those courts before the passage of the act. The plain implication is that proceedings commenced in the state courts after the passage of the act are unauthorized. This is in accordance with the earlier language giving the statute full force and effect from the time of its passage, except that the filing of petitions is to be postponed for a short time. We are of opinion that the language was chosen to make clear the purpose of congress that the new system of bankruptcy should supersede all state laws in regard to insolvency from the date of the passage of the statute."

2. With the purpose of congress thus established to have the law take effect from July 1st, the proviso to postpone the filing of petitions thereunder, in voluntary cases one month and in involuntary cases four months, cannot operate to nullify that purpose for the reasonable preparatory time so directed for commencing the proceedings. It is probably true, as counsel argues, that the authority granted to congress by the constitution to establish uniform laws on the subject of bankruptcy cannot be exercised by the mere abolition or suspension of state insolvency provisions without furnishing a system of remedies in their place. But such system is clearly provided by this act, and the fact that petitions may not be received before the time fixed is a mere regulation of procedure,—the time and manner of commencing actions being always subject to regulation,—and in no sense can it be held that the remedies of suitors, which are presumably adequate and complete, are thereby impaired. There is no vested right in suitors to have the courts open at all times, either to entertain their actions or afford hearings without delay, and it is sufficient for the preservation of all rights

that redress is provided, and can be obtained with reasonable promptness. I am therefore of opinion that congress has duly exercised its paramount authority to establish a uniform system of bankruptcy, and, having placed in the United States courts exclusive cognizance of bankruptcy causes, this court is constrained to entertain the petition in question. There is no jurisdiction to administer in the state courts causes which are clearly so defined in this act, and no ground for applying the doctrine which prevails where jurisdiction is concurrent giving priority to that which is first obtained. The motion to dismiss the petition must be overruled. It is so ordered.

UNITED STATES v. SAPINKOW.

(Circuit Court, S. D. New York. November 29, 1898.)

1. INTERNAL REVENUE—CONSTRUCTION OF AMENDMENTS TO REVISED STATUTES.

When a chapter of the Revised Statutes relates to cigars, and the leading section defines cigars to include cigarettes, "within the meaning of this chapter," a subsequent change in the sections of the chapter by striking out the original sections of the Revised Statutes, and substituting new sections in place thereof, demands that the amendatory law be treated as still governed by the statutory definition in the leading section of the Revised Statutes, and criminal sections substituted for sections in the original chapter in the Revised Statutes, and in terms applicable to cigars, apply to cigarettes.

2. REVISED STATUTES—AMENDMENTS.

A statute amending a section of the Revised Statutes by striking out the same, and substituting other amended provisions therefor, becomes part of the Revised Statutes.

3. SAME.

The case distinguished from decisions under the pension laws, which, by section 5485, Rev. St., made it criminal to charge a greater compensation than was authorized in the title pertaining to pensions (section 4785), in which it was held that a statute enacted subsequent to the Revised Statutes, and repealing section 4785, and fixing different compensation, rendered the criminal provision (section 5485) unenforceable, because no compensation was provided any longer in the title pertaining to pensions.

4. INTERNAL REVENUE—CONSTRUCTION OF STATUTES.

The statutory definition of cigars, making them include cigarettes (Rev. St. § 3387) when the term is used in a certain chapter, is not applicable to provisions of the same chapter, which, on their face, show that the term "cigars" is used in contradistinction to "cigarettes," and exclusive thereof, like Id. § 3394.

5. CONSTRUCTION OF STATUTES—PROVISOS.

The construction of provisos considered. A particular provision held to be a proviso, and not an independent enactment, although the occasional use of the term "provided," to introduce provisions which are independent enactments, and not provisos, is recognized.

6. SAME.

Statutes should be construed so as to harmonize and give effect to all their provisions, so that, when a body of law is amended, the whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of congress. Revenue statutes are, moreover, to be construed liberally.

7. CRIMINAL LAW—COMPLAINTS ON INFORMATION AND BELIEF.

Complaints in criminal cases must be upon such oath as is required by the United States constitution and Rev. St. § 1014; and a complaint purporting to be on information and belief, in which no grounds

and sources of information are stated, but only certain grounds of belief not appearing to be based on deponent's personal knowledge, is insufficient, and does not confer jurisdiction to issue a warrant of arrest.

8. SAME—ISSUANCE OF WARRANTS.

Quære: Is jurisdiction conferred to issue a warrant in a case in which the warrant is issued upon the sworn complaint of a private citizen, which is not approved in writing by a United States district attorney, as required by Act May 28, 1896 (2 Supp. Rev. St. p. 486), even when the complaint is presented to the commissioner by an assistant United States district attorney?

9. SAME.

Defendant was charged in criminal proceedings before United States Commissioner Shields with violations of sections 3392 and 3397, as amended, of the Revised Statutes of the United States (1 Supp. Rev. St. pp. 241, 864), because of dealings with cigarettes not packed, etc., in the manner authorized by the statutes. Counsel for the prisoner moved that the commissioner dismiss the proceedings for want of jurisdiction on the following grounds: (1) That the facts alleged in the complaint do not constitute a crime under any law of the United States, because neither of the statutes mentioned in said complaint, nor the statutes amendatory thereof, in their features apply to cigarettes; (2) because the warrant has not been based on the proof under oath required by the constitution and Rev. St. § 1014; (3) because the complaint is by one other than a government officer upon his information and belief, and was not approved in writing, before its issuance, by a United States district attorney. The material portions of the complaint are set out in the opinion. The complaint purports to be on information and belief by one Kassel, a private individual, and the grounds of his information and belief given are expressed only in the following passage: "Deponent's belief is based upon falsely made cigarettes, purporting to be his manufacture, which are not his manufacture, and which bore deponent's stamps, which cigarettes had been sold by the defendant." The commissioner, by consent of the United States attorney and the attorney for the prisoner, certified the questions to the court for determination. The court, in the following opinion, decides that the motion to dismiss for want of jurisdiction should be granted because the second point is relevant; the first point is decided in favor of the government; and the third point is not decided, because the decision on the second point renders it unnecessary.

(Syllabus by the Court.)

Clarence S. Houghton and Wm. S. Ball, Asst. U. S. Atty., for the United States.

Max J. Kohler, for defendant.

THOMAS, District Judge. The defendant was arrested upon a warrant issued by Mr. Commissioner Shields, upon the complaint of a private person, for alleged violation of the internal revenue laws of the United States, in that (1) he unlawfully removed from the place of manufacture 500 cigarettes, not properly boxed and stamped; (2) and unlawfully and willfully sold and offered for sale 500 cigarettes, which were not packed in a box or boxes previously unused for that purpose, and were not stamped with a stamp denoting the internal revenue tax on the same cigarettes; (3) and did unlawfully fail, neglect, and omit to put up 700 cigarettes manufactured by him and for him, and sell the same, and remove the same for consumption and use, without putting up the said cigarettes in proper packages or parcels, as required by law, and without having affixed to each of said packages or parcels a suitable stamp denoting the tax thereon, and did unlawfully fail, neglect, or omit to properly cancel the stamp thereon appearing,

prior to the sale and removal of the said cigarettes for consumption and use; (4) and did unlawfully sell and offer to sell 500 cigarettes, packed in a form other than in new boxes or packages, not before used for that purpose, containing, respectively, 10, 20, 50, and 100 cigarettes each, but which were placed in old boxes or packages, which had been before used for packing cigarettes, the number of said boxes or packages so removed being no less than 50 boxes or packages, each containing 10 cigarettes.

The statute relating to the offenses charged is contained in chapter 7 of title 35 of the United States Revised Statutes, which comprises sections 3387 to 3406, inclusive. The particular sections involved are section 3387 (the first section in the chapter) and sections 3392 and 3397 contained in such chapter. It is not denied by the defendant that certain sections of the Revised Statutes exist, numbered sections 3392 and 3397, which prohibit the acts and omissions charged against the defendant. But it is urged that the defendant has not committed an offense under such sections, (1) because sections 3392 and 3397, having been amended, are not a part of chapter 7, so as to be applicable to cigarettes, by mere force of the provisions of section 3387 of chapter 7, which provides that "cigarettes and cheroots shall be held to be cigars under the meaning of this chapter"; (2) because the new section 3397 does not of itself make provision for cigarettes, and, while 3392 does provide for the packing of cigarettes, no penalty is attached to a disobedience of the provision.

The following legal proposition will be first considered: When a chapter of the Revised Statutes relates to cigars, and the leading section defines cigars to include cigarettes, does a subsequent change in the sections of the chapter exempt cigarettes from the statutory definition? By Act 1879, c. 125, § 16, sections 3387, 3392, and 3397 were amended (1 Supp. Rev. St. pp. 240, 241), and by Act 1890, c. 1244, section 3392 was again amended (1 Supp. Rev. St. p. 864). But the definition of cigars, as contained in original 3387, is not, in terms, disturbed. By the act of 1879 it is provided "that section thirty-three hundred and ninety-seven be, and the same is hereby, amended by striking out all after the said number, and substituting therefor the following." Then follows the new phraseology, which differs from that in the original section by providing for "*stamping, indenting, burning or impressing into each box, in a legible and durable manner* (with a branding iron), the number of cigars contained therein (the name of the manufacturer), the number of the manufactory, and the number of the district, and the state," etc. The italicised words are in the new section, and not in the old, and the words in parentheses are in the old statute, and not in the new. The new section also contains a provision relating to cigars exported, and their exemption from the internal revenue tax. Two facts are noticeable: (1) The new section is a substitute for the old, and is in terms related to chapter 7; (2) the new provision for "stamping, indenting, or impressing into each box" certain information, makes the provision more applicable to cigarette packages than did the old provision for burning, which was more suitable for cigar boxes. Therefore the amendments make the section more applicable to cigarettes than it was before. Without re-

ferring for the moment to section 3392, the present inquiry may be, is section 3397 so made a part of chapter 7 as to bring cigarettes within its provisions by virtue of the definition of cigars contained in section 3387? Chapter 7 is a constituent part of title 35, which in turn is a subdivision of the Revised Statutes. Chapter 7, as regards the subject of which it treats, is given a certain isolation and completeness, whereby certain sections are assembled into one common whole. This clustering of sections was adopted because they were deemed homogeneous, and, while they may be interdependent, they are not related for the purposes of their application, either to other parts of the Revised Statutes, or to extrinsic chapters. The result is that when a certain section is changed, either in form or substance, a change is made, not only in the section, but also in the entire chapter; and the lawmaker, in providing the new matter, if it be such, is deemed to have had chapter 7 and all its sections in view, and to have subjected the new provisions to their influence. When section 3397 was changed in phraseology, and slightly in substance, by the addition of cognate matter, it was still 3397 of chapter 7, and continued to perform the former office of that section, in its allotted relation to all the other sections of the group of which it was an integral part. Attention is called in the interesting and skillful brief of the defendant's counsel to *U. S. v. Mason*, 8 Fed. 412; *U. S. v. Hewitt*, 11 Fed. 243; *U. S. v. Jenson*, 15 Fed. 138; *U. S. v. Starn*, 17 Fed. 435; *U. S. v. Moore*, 18 Fed. 686; *U. S. v. Goodwin*, 20 Fed. 237; *U. S. v. Van Vliet*, 22 Fed. 641. See, *contra*, *U. S. v. Dowdell*, 8 Fed. 881. These cases involved an offense created by section 5485 of the Revised Statutes, which is a part of the crimes act, which made it a crime for a person to charge or retain "any greater compensation for his services than is provided in the title pertaining to pensions," of which section 4875 provided that such compensation should be \$25. Subsequently this section was repealed, and provision was made in the repealing act for allowable charges of pension agent. See chapter 367, Act 1878 (20 Stat. 243). This repeal of section 4785 left section 5485 without foundation for a criminal prosecution, since the section to which it referred had ceased to exist. In other words, the offense and its punishment were created by two primarily independent statutes, contained in different titles of the Revised Statutes; but a connection was established for the purposes of the penalty by a reference in one statute to the other. Later the section containing the punishment by repeal ceased to exist, and nothing was inserted in its place. Hence the section referred to an hiatus in "the title pertaining to pensions." The case is not at all analogous to that at bar. Here the changed section (3397) is a component part of a particular chapter, adjusted to its other provisions, and in terms is attached to that chapter, and the amendments in certain particulars made the section more applicable to cigarettes, and in other particulars did not make it less applicable to cigarettes. If the material that made up the old section was taken away, coincidentally with its removal a similar provision took its place. But in the application of the definition contained in section 3387 to cigarettes there is an opportunity for interpretation. Under such definition chapter 7 would not be regarded as applicable to cigarettes,

so far as some special provision therein was specifically made for cigarettes. Thus, in section 3394, the tax on cigars and cigarettes is stated at different amounts. In such case the specific provision for a tax on cigarettes would except it from the provision relating to cigars, and it may be that some other provision might, in the nature of the case, be so peculiarly applicable to cigars, and so obviously inapplicable to cigarettes, that a court would be justified in construing the statute accordingly.

Having concluded that section 3397 as amended is but a continuation of the original section, and subject to the operation of section 3387, the court is brought to the consideration of section 3392. Should the same construction be observed? The amendment changes the former section in the following particulars: (1) By allowing cigars to be packed in boxes containing 200 each; (2) by allowing the use of sample boxes containing not less than 12 nor more than 13 cigars; (3) by prohibiting packing less than the allowed number of cigars in each box; (4) by omitting the minimum fine and imprisonment; (5) by providing (a) for the packing of cigarettes in quantities other than the quantities appointed for cigars, (b) for the affixing of suitable stamps on packages of cigarettes, and the cancellation thereof, prior to sale or removal for consumption or use, under such regulations as the commissioner of internal revenue shall prescribe, (c) that imported cigarettes shall be packed, stamped, and the stamps canceled in like manner in addition to the import stamp. See similar provision, section 3402. It will be observed that the substantial change in the section relates to the several quantities of cigarettes containable in a given box. The change indicated under (1), above, is incorporated in the purview of the primary provision commanding in what quantities cigars may be packed. Thereupon the matter indicated under (2) is brought in by a proviso for sample boxes, which proviso modifies so much of the purview of the statute as precedes it. The purview of the section then continues, and is accompanied by a proviso as to retail dealers, all substantially, save the omission of the minimum penalties, as is contained in the section before this amendment. Thereupon follows the provision for packing and stamping cigarettes, etc., which is brought in under a paragraph introduced by the words "and provided further." This proviso excepts from the purview of the section cigarettes to the extent stated, viz. in regard to the quantities in which they shall be packed; that is, while the purview prescribes that cigars shall be packed in certain quantities, cigarettes are excepted from such provision, and are directed to be packed in certain other quantities. The very fact that this proviso is used to save out cigarettes from the provision applicable to cigars shows that congress regarded cigarettes as cigars, and, unless differentiation were made as to the packing thereof, they would fall within the provision as to cigars. The general purpose of a proviso is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular, although it has been pointed out that "it is a common practice in legislative proceedings in the consideration of bills for parties desirous of securing amendments to

them to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater significance than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences." *Railroad Co. v. Smith*, 128 U. S. 174, 181, 9 Sup. Ct. 49. It has been said of a proviso that the general rule is that a proviso carves special exceptions out of the body of the act (*Ryan v. Carter*, 93 U. S. 83); that the office of the proviso, generally, is either to except something from the exacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extending to cases not intended by the legislature to be brought within its purview. *Minis v. U. S.*, 15 Pet. 423, 446. There seems to be no doubt of the effect of the proviso in the case at bar. A particular section of a particular chapter of the Revised Statutes was amended. That chapter, by section 3387, included cigarettes within the word "cigars"; the amended section provided a slight change for packing cigars. This new manner of packing cigars would include cigarettes, and a proviso was added that excepted cigarettes from that manner of packing; but the proviso did not, beyond its terms, operate upon the purview. Hence, while cigarettes were excepted from the purview as to packing, they were not thereby excepted from the remaining provisions of the purview. Hence the punishment provided in the purview applied to any omission to pack as directed in the proviso relating to cigarettes. There is no incongruity, and no absurdity in the application of the statute can result. It is one of the purposes of the just interpretation to avoid this (*Heydenfeldt v. Mining Co.*, 93 U. S. 634, 638), and to harmonize and give effect to all of the provisions of a statute (*Platt v. Railroad Co.*, 99 U. S. 48). Therefore, when a body of law is amended, "the whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of congress." *Saxonville Mills v. Russell*, 116 U. S. 13, 21, 6 Sup. Ct. 240, where it is said: "In the interpretation of our system of revenue laws, which is very complicated,' as was said in the case of *U. S. v. Sixty-Seven Packages of Dry Goods*, 17 How. 85, 93, 'this court has not been disposed to apply with strictness the rule which repeals a prior statute by implication, when a subsequent one has made provision upon the same subject, and different in some respects from the former, but have been inclined to uphold both, unless the repugnancy is clear and positive, so as to leave no doubt as to the intent of congress.'" A consultation of that case will illustrate how far the court went to perpetuate a proviso connected with a statute, and attach it to a subsequent statute. It is elsewhere stated that: "Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them, and most effectually accomplish these objects." *Cliquot's Champagne*, 3 Wall. 114, 145; *U. S. v. Hodson*, 10 Wall. 395; *Smythe v. Fiske*, 23 Wall. 374, 380. It requires no construction illiberal to the defendant to regard

section 3392, as amended, as a continuing portion of chapter 7, and in assuming that congress had in view that chapter, and each and every provision thereof, in making the alteration contained in the amended section. It would, on the other hand, offend the rule of interpretation above stated to regard the amendment to section 3392 as a repeal pro tanto of the definition of cigars contained in section 3387. There is no repugnancy and no difficulty in construction. The section continues as a part of chapter 7, performing its duty as a part thereof, and the statute expressly points out the extent to which cigarettes are intended not to be classed as cigars. The provisions of section 55, c. 1244 (1 Supp. Rev. St. p. 869), are consonant with these views. But it is urged that the power of regulation given to the commissioner of internal revenue enables him to make regulations, the disobedience of which would entail punishment, and that this is beyond the power of congress. It is not understood that a disobedience of any such regulations is charged against the defendant. The statute in terms prohibits all the offenses involved in his arrest, and provides a punishment therefor.

Aside from the questions just discussed, it is claimed that the warrant of arrest was issued without jurisdiction, because the complaint herein was not on such oath as is required by the United States constitution and the Revised Statutes (section 1014). The warrant is issued on the complaint of one Kassel, a private citizen, and all the statements of alleged fact rest upon information and belief. No grounds of information are stated, but deponent's belief is stated to be "based upon falsely made cigarettes [whatever that means] purporting to be his [deponent's, intending] manufacture, which were not his manufacture, and which bore deponent's stamps, which cigarettes had been sold by the defendant." How did the deponent know that the defendant sold these false cigarettes? He has just sworn to the fact on information and belief. Is he using alleged facts, which he knows only on information and belief, as a statement of the basis of his belief? It appears so to the court. Without examining the decisions cited by the learned counsel for the defendant, it is evident that the complainant has not stated any grounds either for his information or belief. Did he know where defendant's place of manufacture was? Did he know or hear of the defendant doing any of the acts alleged against him? Did he see any of the cigarettes sold? Does he know or hear of any fact or circumstance in any degree connecting the defendant with any of the transactions alleged on information and belief? If so, why did he not state when and where he derived his knowledge? As his affidavit stands, the deponent has stated on his information and belief that the defendant was guilty of various acts and omissions, but he fails utterly to give the slightest substantiation of such information and belief, or either.

Further objection is made to the warrant upon the ground that it is issued upon the sworn complaint of a private citizen, and is not approved in writing by a United States district attorney, as provided by the act of May 28, 1896. 2 Supp. Rev. St. p. 486. Inasmuch as the warrant cannot be sustained for the reason that the grounds of the complainant's information and belief are not sufficiently set forth, it is unnecessary to consider this objection. If it shall appear to the district attorney to have been well taken, the omission can be supplied in future cases.

RICHMOND MICA CO. v. DE CLYNE et al.

(Circuit Court, D. New Jersey. December 14, 1898.)

1. PRELIMINARY INJUNCTION—SUFFICIENCY OF SHOWING.

A preliminary injunction will not be granted prohibiting a defendant from continuing an employment alleged to be in violation of a contract with the complainant, on a bill which does not set out such contract, nor disclose the circumstances surrounding its execution, so as to enable the court to judge of its validity.

2. PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction will not be granted to restrain the use of a machine alleged to infringe a patent which has not been adjudicated upon, when the bill does not disclose any use or public acquiescence in the same, and proof of infringement is not clear.

This is a suit in equity by the Richmond Mica Company against Gustav De Clyne and others for infringement of a patent and the specific enforcement of a contract. Heard on motion for preliminary injunction.

Charles Black and Benjamin West, for the motion.

Charles L. Corbin, opposed.

KIRKPATRICK, District Judge. The bill filed in this cause has two separate and distinct objects: (1) To determine the validity of a patent claim, and an adjudication as to whether some of the defendants, who are associated as the Homestead Mica Company, are using an infringing machine; and (2) to obtain the specific performance of a contract said to have been entered into by another defendant not to manufacture mica for three years from the date of said agreement.

The defendant Robert W. Traylor is an employé of the Homestead Mica Company, but otherwise has no interest in the company, nor have they in the subject-matter of the suit against him. Without considering the question raised as to the multifariousness of the bill, it will be sufficient at this time to say that the complainant does not show itself entitled to the relief sought on either branch of the case.

The contract said to have been entered into between the complainant and the defendant Traylor has not been set out in the bill of complaint, nor has a copy been annexed thereto. It is impossible, therefore, for the court to determine the rights of the parties thereunder. No opportunity is afforded the court to examine the circumstances surrounding its execution, to ascertain whether the considerations were full and fair, or whether, by reason of its general provisions, it would be void as being in restraint of trade. As the case is presented to the court, it would not be justified at this time in forbidding the defendant to follow an employment which he says is necessary for the support of himself and family.

The patent of the complainant has never been adjudicated upon, nor does the bill disclose any use or public acquiescence in the same. The first claim, upon which alone the complainant relies, seems to be a very narrow one. The earlier patents produced show that in no sense can it be said to be in the pioneer ranks. It is not so claimed. The complainant's evidence of infringement consists solely in a statement

said to have been made by an employé of the defendants, that the machines used by the Homestead Mica Company were the same as the complainant's patented machines. This statement of fact is uncorroborated by the testimony of any expert who has seen or examined either machine. Standing alone, such testimony would not carry convincing weight to the mind of the court; much less does it do so when, as in this case, the employé denies having made the statement attributed to him. The defendants' answering affidavits call attention to radical differences in the machines, and their exhibits of prior patents cast a doubt upon the novelty of the complainant's device. Under the rule approved by the circuit court of appeals in this circuit in the case of Whippany Mfg. Co. v. United Indurated Fibre Co., 30 C. C. A. 615, 87 Fed. 215, the motion for preliminary injunction will be denied.

TOWER v. EAGLE PENCIL CO.

(Circuit Court, S. D. New York. November 19, 1898.)

PATENTS—CORK SLEEVE FOR PENHOLDERS.

The Tower patent, No. 378,223, for a penholder with a cork sleeve for ease of the fingers, *held valid, and infringed.*

This was a suit in equity by Levi L. Tower against the Eagle Pencil Company for infringement of a patent.

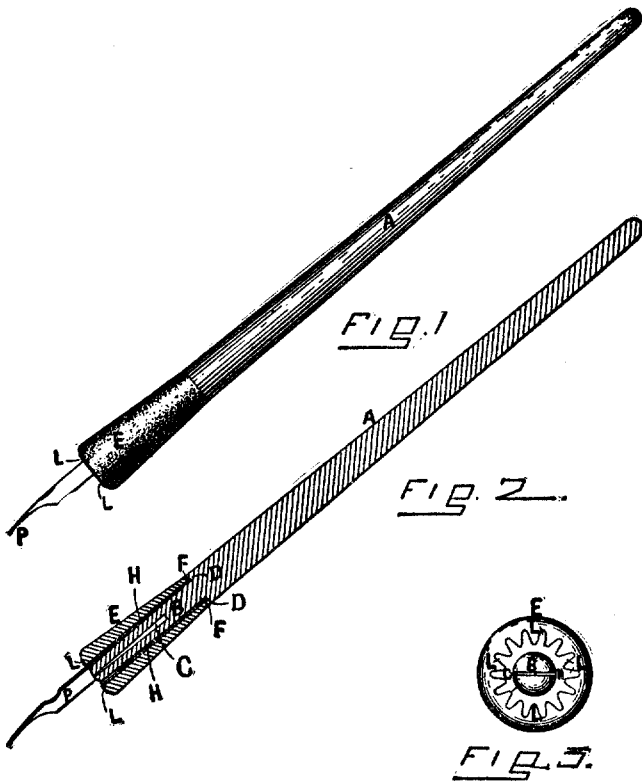
Walter S. Logan, for plaintiff.

Marcellus Bailey, for defendant.

WHEELER, District Judge. The patent in suit is No. 378,223, dated February 21, 1888, and granted to the plaintiff for a penholder with a cork sleeve for ease of the fingers, fitting smoothly over a round tenon against a square shoulder on the lower end of the body of the holder, and strengthened by a metal tube on the end of the tenon inside the sleeve, with radial points turned outward from the end of the tube over the lower end of the sleeve, and with a slot in the end of the tenon permitting the sides to spring inwardly and admit the pen between one of them and the tube. The specification, referring by letters to the parts aptly shown in drawings, sets forth:

"In order that the sleeve, E, of cork may be protected from abrasion when inserting the pen, P, in position in the holder, I provide a metal re-enforce tube, H, which fits snugly upon the slotted tenon, B, and within the longitudinal opening formed through the said cork sleeve, E, and has its lower end portion formed into a series of radial points, L, which are turned outward over and upon the lower end of the cork sleeve, whereby the rigidity of the pen is secured within the cork sleeve, and the liability of its being broken is greatly diminished, as it is protected by the points, L.

"It will be seen and understood that by the construction of the penholder as above set forth I am enabled to employ a very thin sleeve of cork, and retain all of its desirable qualities, with little expense, as its exterior 'velvety surface,' which is so agreeable to the fingers, when held a long time in writing, and which had heretofore required an inconvenient size, and, on account of the brittleness of cork when made of a solid piece, rendered the same objectionable, as well as the increased cost of production. I fully overcome these and other defects by my present invention, which forms a cheap, simple, convenient, and durable penholder of superior quality. I am aware that



solid cork penholders are old and well known, and that penholders have been constructed with hard-rubber sleeves, and also with elastic rubber sleeves and with metal tips. Therefore I do not claim cork, or any other material, but limit my invention to the novel construction of the thin cork sleeve re-enforced with a metal tube, and protected from abrasion at the ends, as set forth."

The claim is for—

"A penholder consisting of the body portion, A, provided with a tenon, B, having an annular socket or groove, D, provided with a cork sleeve, E, one end of which is fitted within the said groove, and its opposite end portion provided with a re-enforce metal tube, H, having a series of points, L, which contact with the end of the said sleeve, as shown, all being constructed and arranged substantially as described."

The limitations of the field of invention by prior things and patents are substantially well stated in the patent as shown by these extracts. Cork was not new, nor were sleeves of different material in softness or elasticity from the body of the holders; and, if this was a mere substitution of cork for rubber, there would be great difficulty in finding here any patentable invention, as there was in *Hotchkiss v. Greenwood*, 11 How. 248. But that does not seem to be exactly this case. Cork appears to be very desirable in this place; but, from its bulk in proportion to its strength, it was difficult to be had there in convenient size and shape. It could not be held in place, nor maintain itself,

as rubber would. The invention was of means to make the substitution. The body was to be contrived of convenient size, with the proper tenon and shoulder, for holding the cork sleeve, without having it too large, or in the way, at the upper end; and the metal tube with outward turning points, for protecting the sleeve at the lower end, and for holding the pen, was to be planned. This could not probably be accomplished by telling a good workman in penholders to do it. Creative thought and calculation seem to have been necessary, and to have been sufficiently involved in arranging the parts, although old, or of old material, to amount to patentable invention. *C. & A. Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194. The penholder brought out was a new, and seemingly a patentable, manufacture.

The defendant's penholder seems to be made in exact accordance with the plaintiff's patent, except that the metal tube, instead of being formed at the lower end into a series of radial points, which are turned outward, over and upon the lower end of the cork sleeve, is turned outward whole against the end edge of the cork sleeve, which is left, or made, perpendicular. This difference, however, does not seem to be actually material, or to have been conclusively made material, by the terms of the patent. The turned outward straight edge of the defendant's tube does the same thing as the turned outward crooked edge of the metal tube of the patent, and in substantially the same way. The one is the equivalent of the other so far as either is material, and the variance is in an unimportant detail. The substance of the patented invention appears to have been taken. Decree for plaintiff.

BALL & SOCKET FASTENER CO. v. COHN et al.

(Circuit Court, S. D. New York. December 5, 1898.)

PATENTS—SUIT FOR INFRINGEMENT—MULTIFARIOUSNESS OF BILL.

A bill for the infringement of a patent, which also alleges, and seeks to recover damages for, unfair trade and competition in the sale of the patented article prior to the issuance of the patent, is multifarious; the two causes of action being entirely distinct from each other.

These are two suits in equity by the Ball & Socket Fastener Company against Julius Cohn and others, each for the infringement of a patent, and for an accounting, and the recovery of damages for unfair competition in trade. Heard on demurrers to the bills.

George O. G. Coale, for plaintiff.

Odin B. Roberts, for defendants.

WHEELER, District Judge. One suit is brought for alleged infringement of patent No. 604,637, applied for June 20, 1895, dated May 24, 1898, and granted to William S. Richardson, assignor to the plaintiff, for an improvement in detachable fasteners for gloves and garments. The other is brought for alleged infringement of design patent No. 27,865, applied for April 29, 1897, dated November 16, 1897, granted to William S. Richardson for a design for the socket member

of such fasteners, and assigned, with back damages for infringement, May 20, 1898, to the plaintiff. Each bill, besides, alleges:

"That the orator has been long in business, and has established a good standing, and began to make and sell the patented fastener in the summer of 1895, for which there has been and is a large market; that the articles in question are small, and sold in large quantities, and that it is extremely difficult, though not impossible to those skilled in the art, to determine whether certain fasteners are made by your orator, and under said letters patent, or are made in defiance of your orator's said right, so closely do defendants' fasteners resemble your orator's; that the defendants, so your orator is informed and believes, are large jobbers and distributors, and have been and are selling fasteners in varying quantities to other dealers, made in imitation of your orator's said fastener (by whom your orator is ignorant), and until recently have sold said goods in bulk, and without disclosing upon the package by whom they were made or sold; and your orator is informed and believes that the said spurious and infringing goods have been sold surreptitiously in large quantities in all parts of this country, and in unfair competition with the goods of your orator, and that these defendants have availed themselves of said advertising of your orator, and of the business push and enterprise by which your orator first made known the value of these goods to the public, to make sales herein complained of, to the manifest injury of your orator, and the defendants have derived and still continue to derive from such use of the said invention, and of the reputation of your orator, large gains and profits,"—and prays that "the said defendants may be compelled by decree of this court to account for and pay over to your orator all such gains and profits as have accrued to or have been received by them by reason of their unlawful acts hereinbefore complained of, and also the damages which your orator has sustained by said unlawful acts of the said defendants."

The bills have been demurred to for multifariousness, and the cases have been heard together. If the bills had not gone back of the issue of the respective patents, in alleging the unfair and unlawful competition in trade, they would have been good, as setting out only the different consequences of the same act, as held by Judge Shipman in *Adee v. Peck Bros. & Co.*, 39 Fed. 209, followed by Judge Dallas in *Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co.*, 60 Fed. 622. The plaintiff does not, and would not seem to be entitled to, set up and recover for any infringement before the grant of the patents. *Rein v. Clayton*, 37 Fed. 354; *Kirk v. U. S.*, 163 U. S. 49, 16 Sup. Ct. 911. The unlawful competition before that is entirely distinct from any infringement after; and the setting that up as a ground for relief, with that for the infringement of the patent in each case, makes two cases for distinct relief in the same bill. That the relief sought for the unlawful competition before the patents is of the same nature as that which might be included with that for the infringements after, does not cure the difficulty. The acts are separate, and their consequences distinct. The defendants, as the bills are framed, would have to answer two separate and distinct matters in each case. If this could be required, these two bills could, probably, as well have been joined in one as to have been brought separately. Demurrers sustained.

BRILL v. ST. LOUIS CAR CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 28, 1898.)

No. 1,049.

1. PATENTS—CONSTRUCTION OF CLAIMS—AMENDMENT OF APPLICATION.

Where an applicant for a patent amends and limits his claims and specification to meet objections of the patent office, whether such objections were well founded or not, he is not entitled to the benefit of the original claims under the patent issued, nor to a construction making the amended claims as broad as those abandoned.

2. SAME—LIMITATION OF CLAIM BY SPECIFICATION.

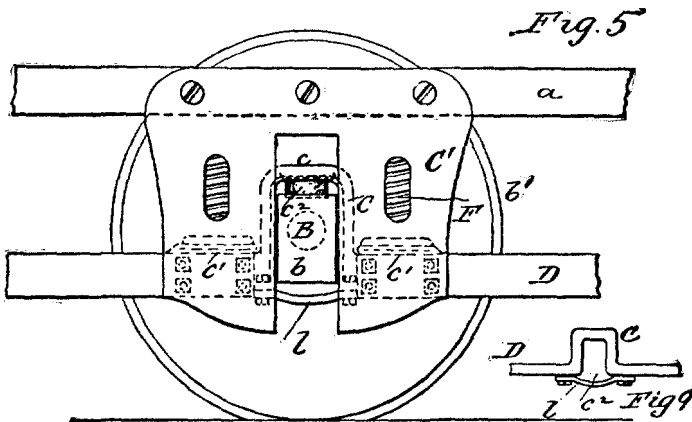
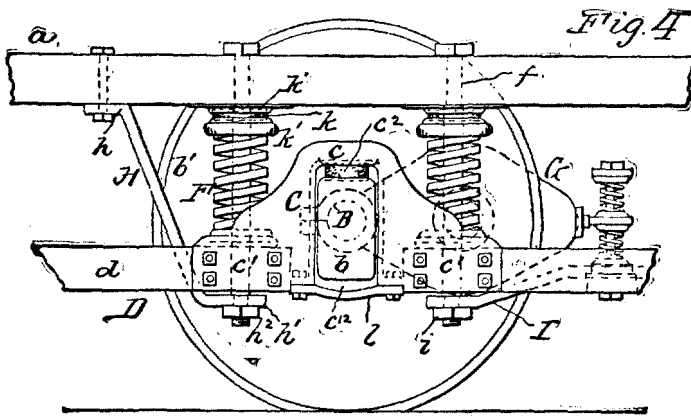
The words "substantially as set forth," at the end of a claim, refer to the specification, and make it an essential part of the claim; and, where the language of the claim is general, it is limited by the more specific description contained in the specification.

3. SAME—TRUCKS FOR STREET CARS.

The Brill patent, No. 432,115, for a street-car truck, as to claims 1, 4, and 6, must be limited to a combination of parts, an essential element of which is that the housings of the axle-boxes shall extend to or below the bottom of such axle-boxes. Claim 3, which described the truck frame, was anticipated by the frame shown in the Woodbury patent, No. 48,008, for a frame for a steam street car.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

This was a suit by John A. Brill, the appellant, against the St. Louis Car Company et al., the appellees, to restrain the infringement of letters patent No. 432,115, which was issued to John A. Brill on July 15, 1890, pursuant to an application filed on April 27, 1889. The invention covered by the patent relates to street-railway car trucks of the kind that are designed to carry electric motors, grips, or other analogous devices. In his specification the inventor stated that the object of his invention was "to provide a truck frame of which the housings or pedestals for the axle-boxes form a component part of the truck frame, which is wholly supported upon or suspended from the axle-boxes, so that neither the frame, pedestals, nor appurtenances mounted on the frame, are subject to the vertical vibration of the car body, and an easier riding car body and an easier traveling running gear and truck frame are provided, and which admits of easy and quick removal of any or all of the wheels and axle-boxes for repairs or replacement, without necessitating the dismantling of the truck frame. * * * The invention claimed by the patentee is fairly disclosed by the drawings Nos. 4, 5, and 9, which appear on the opposite page. In the drawings last referred to, B represents the axle of the car; b the axle-box; C represents the housings or pedestals for the axle-boxes, which are not secured to the body of the car, but are supported by the axle-boxes. The pedestals, so termed, are in the form of an inverted U, shown more clearly in Fig. 9, and the sides thereof extend to or below the bottom of the axle-boxes, as disclosed in Fig. 5, to maintain them in their normal position. The ends of the pedestals, c', shown in Figs. 4 and 5, are connected together by side bars, d, shown in Fig. 4, to form the frame, D, of which the pedestals, C, are an integral or component part, and constitute the truck frame for the car. Between the top bar, c, of the pedestals, and the axle-boxes, b, are interposed cushions of rubber, c², to provide a spring support for said pedestals on the axle-boxes. Through vertical openings in the pedestal ends, c', pass posts, F (see Fig. 4), which depend from the sills, a, of the car body. The lower ends of the posts, F, are suitably braced by a brace, H, shown in Fig. 4, which is bolted to the car sill, a, and by a truss-rod, I, which is also shown in Fig. 4. Surrounding the posts, F, are car springs, the lower ends of which rest on the frame, D, or on the ends of the pedestals, c'. The only claims of the patent that are involved in the present action are claims Nos. 1, 3, 4, and 6, which are as follows:



"What I claim is: (1) A truck frame, D, having component axle-box, pedestals or housings supported on and extending to or below the bottom of the car axle-boxes, in combination with a spring-supported car body, substantially as set forth. * * * (3) In combination with the axle-boxes of a car, the frame, D, having axle-box pedestals, C, with lower open ends, c^{12} , extending down to the bottom sides of said frame, and the latter extending longitudinally beyond the car axles, substantially as set forth. (4) In a car, the frame, D, having pedestals, C, supported on, and extending down to or below the bottom of, the axle-boxes, springs inserted between said pedestals and boxes, and spring supports for said car on said frame, substantially as set forth. * * * (6) In combination with a car body and its running-gear axle-boxes, the frame, D, having component yoke-shaped axle-box pedestals, C, with lower open ends, c^{12} , inner and outer posts, F, connecting frame, D, and car body, car springs surrounding said posts, braces, H, for the outer posts, and a separate truss-rod, I, for the inner posts, F, substantially as set forth." The circuit court held that none of the aforesaid claims were infringed by the device which was in use by the defendants, and it accordingly dismissed the bill of complaint. The case is before this court on appeal from such decree.

Francis Rawle, for appellant.

George H. Knight, for appellees.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The trial court found, and its finding in that respect is not controverted by the complainant, that the infringing device of which complaint is made in the bill differs from the device described in complainant's patent, No. 432,115, in that the housings or pedestals of the car axle-boxes in the infringing device do not extend to or below the bottom of said axle-boxes. The trial court further decided that, upon a true construction of the patent in suit, claims 1, 3, 4, and 6, set forth in the statement, must be limited to a combination of parts, one element of which, to wit, the housings of the axle-boxes, is so constructed as to extend to or below the bottom of said axle-boxes. In consequence of this construction of the patent, it followed, of course, that the defendants were not guilty of an infringement. We are of opinion that the patent was properly construed by the trial court in the respect last stated, and that the charge of infringement was not sustained. In every instance where the housings of the axle-boxes are specifically described in the specification of letters patent No. 432,115, they are described as extending down "to or below the bottom of the axle-boxes"; and the same language is repeated substantially in the claims now under consideration, except the third and sixth. It also appears from the testimony that in order to obtain the patent in suit the patentee was compelled to modify his original claims for which claims 1 and 4 are a substitute, by inserting the limitation with respect to the housings, that they extended to or below the bottom of the axle-boxes. The original claims, for which claims 1 and 4 appear to have been substituted, contained no such limitation. The patent office rejected the original claims, pointing out that as drawn they covered a combination which was anticipated by prior patents, to wit, patents Nos. 399,468 and 402,890, which were issued respectively to W. S. G. Baker on March 12, 1889, and to S. A. Bemis and L. Pfingst on May 7, 1889, whereupon the complainant amended his specification and original claims so as to make it appear that the housings therein claimed extended to or below the bottom of the axle-boxes. When thus differentiated from the prior art, the patent was allowed containing claims 1 and 4 in their present form. In view of this amendment of the specification and claims to meet the objections of the patent office, it is clear, upon the authorities, that the patentee cannot now be heard to assert that the amendment was immaterial, and that his claims cover housings or pedestals which do not extend to or below the bottom of the axle-boxes. He is not at liberty to insist upon a construction of his claims which will cover a method of constructing the housings which he was required to abandon or disclaim for the purpose of obtaining favorable action on his application. It is immaterial, we think, whether the patent office was right or wrong in rejecting the complainant's original claims on the ground that the invention therein described was anticipated by the prior art. By amending his specification and claims the complainant admitted, in effect, that some limi-

tations were necessary; and it is now too late to assert that he was entitled to his original claims, or that the claims as finally allowed are as broad as the original claims. *Sutter v. Robinson*, 119 U. S. 530, 7 Sup. Ct. 376; *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. 493; *Erie Rubber Co. v. American Dunlop Tire Co.*, 28 U. S. App. 470, 515-517, 16 C. C. A. 632, and 70 Fed. 58, and cases there cited.

In the sixth claim of the patent the housings or pedestals are not specifically described as extending to or below the bottom of the axle-boxes, but in view of the prior art, and the action of the patent office to which we have already alluded, we think that this limitation must necessarily be read into the sixth claim, and that the housings and pedestals therein referred to are no other than those described in claims 1 and 4, and in the specification; that is to say, we are of the opinion that the "yoke-shaped axle-box pedestals, C," referred to in the sixth claim, are the pedestals which are in every instance described in the specification as extending to or below the bottom of the axle-boxes. The words "substantially as set forth," with which this claim concludes, refer to the specification, and make the description of the housings therein contained an essential part of the claim. "General language in a claim which points to an element or device more fully described in the specification is limited to such an element or device as is there described." *Adams Electric Ry. Co. v. Lindell Ry. Co.*, 40 U. S. App. 482, 512, 23 C. C. A. 223, and 77 Fed. 432, 449; *Mitchell v. Tilghman*, 19 Wall. 287; *Stirrat v. Manufacturing Co.*, 27 U. S. App. 13, 47, 10 C. C. A. 216, and 61 Fed. 980.

Claim 3 of the complainant's patent, which covers the frame, D, having axle-box pedestals with lower open ends, in combination with the axle-boxes, is, in our judgment, anticipated by the method of constructing the trucks of a street steam car which is shown by United States letters patent No. 48,008, which was issued to Joseph P. Woodbury on May 30, 1865. This patent was offered in evidence by the defendants, together with several other patents, in support of the plea of anticipation; and, in our judgment, it discloses the exact combination covered by the complainant's third claim. As no other error has been assigned, except the failure of the lower court to enter a decree for the complainant sustaining the validity of claims 1, 3, 4, and 6, it follows from what has been said that the decree must be affirmed, and it is so ordered.

THE JAMES BAIRD.

COTTINGHAM v. ABBOTT et al.

(District Court, D. Massachusetts. December 6, 1898.)

No. 834.

1. SHIPPING—RATE OF DISCHARGING CARGO—CONSTRUCTION OF CHARTER PARTY.

A charter party for a vessel to be loaded with lumber provided that "the lay days for loading or discharging shall be as follows (if not sooner dispatch), commencing one clear day from the time the captain reports his vessel ready to receive or discharge cargo: * * * Loading with all possible dispatch, but not less than 25 M. feet daily. * * * The cargo or cargoes to be * * * delivered according to custom of the port of discharge." *Held*,

that such contract did not expressly provide for the rate of discharge at 25 M. feet daily.

2. SAME—CUSTOM OF PORT.

A custom of a port as to the rate of discharging a certain kind of lumber from a vessel, to govern the rights of parties under a contract otherwise indeterminate, must not only be established and reasonable, but also certain and definite. Such a custom cannot be found on testimony that the rate is "from 17,000 to 20,000" feet per day, or "from 25,000 to 30,000" feet. Such testimony can only establish the usual or average time for unloading, and is valuable only as showing the limits, under ordinary circumstances, of a reasonable rate of discharging lumber of that kind at such port, and does not obviate the necessity of considering the particular circumstances of each case.

3. SAME—INCONVENIENCE OF WHARF—LIABILITY OF CONSIGNEE FOR DELAY.

Where the wharves at a port are not all equally convenient for the discharge of every sort of cargo, in the absence of a custom establishing a uniform rate, a reasonable rate of discharge is not necessarily the same at all wharves, and, while a wharf may be so inconvenient as to render the consignee responsible for the delay in discharging thereat, the reasonable convenience required is not the highest degree of convenience either imaginable or actually existing.

This was a libel in admiralty for demurrage on account of delay of the respondents, as consignees, in discharging a cargo.

Carver & Blodgett, for libelant.

John Lowell, for respondents.

LOWELL, District Judge. The libelant in this case is the owner of the schooner James Baird, upon which a cargo of hard pine timber and flooring was shipped from Pascagoula, Miss., to Boston, consigned to the respondents. The material parts of the charter party are as follows:

"A full and complete cargo of kiln-dried and resawn pitch pine lumber under, and on deck. Cargo to be all kiln-dried lumber under deck. It is agreed that the lay days for loading or discharging shall be as follows (if not sooner dispatch), commencing one clear day from the time the captain reports his vessel ready to receive or discharge cargo at such safe anchorage as the charterer may direct: Loading with all possible dispatch, but not less than 25 M. feet daily, Sundays excepted; and that, for each and every day's detention by default of said party of the second part or agent, thirty-seven & ⁰⁰/₁₀₀ dollars per day shall be paid by said party of the second part or agent to said party of the first part or agent. The cargo or cargoes to be received alongside, within reach of vessel's tackles, and delivered according to custom of the port of discharge."

The material parts of the two bills of lading are as follows:

- "(1) Shipped in good order and well conditioned:
 - "32,945 pcs. rough kiln-dried lumber, containing 260,863 feet.
 - "9,313 pcs. dress kiln-dried lumber, containing 40,342 feet.
 - "About 99,378 feet of the above lumber is on deck.
- "(2) 4,612 pcs. 4¼x4 rift. flg. containing 35,560 feet.
 - "16 pcs. resawn lumber, containing 14,526 feet.
 - "About 32,000 feet of the above lumber is on deck."

The captain duly reported his arrival on May 21, 1896, about 5 p. m., and was directed to Mystic Wharf. The "resawn lumber," or timber, all of which was on deck, was there discharged into the water at a time which I am not able to determine precisely from the evidence, but, at the latest, before the noon of May 25th. Otherwise no berth was provided and no cargo was discharged until May 26th, when a berth was provided, but, as the day was rainy, the discharge did not begin until May 27th.

It continued upon every week day through June 3d, when the discharge of the deck load was completed. On June 4th the Baird was moved to a dock owned by the respondents, but could not come close alongside it, owing to want of water, until a part of the cargo below deck had been taken off over a temporary bridge. This occupied two or three days, after which the Baird, being lightened, was hauled up to the dock. Thereafter it is admitted that the discharge was sufficiently prompt.

The libelant contended in argument that the charter party provided expressly for a discharge at the rate of 25 M. per day, but in this I think he is mistaken, and that the express agreement relates only to the rate of loading, although a rate of loading, stipulated by the parties, may, in some cases, be evidence of what is a reasonable rate of discharge. The libelant further alleged a custom of the port of Boston fixing 25,000 feet per day as a reasonable rate for the discharge of this kind of flooring, while the respondents alleged an established custom of less than 20,000.

The evidence on both sides satisfies me abundantly that no customary rate, properly so called, exists for the discharge of this kind of lumber. The appropriate office of a custom is to interpret the otherwise indeterminate intentions of the parties or to ascertain the true meaning of a particular word. See *The Reeside*, 2 Sumn. 567, Fed. Cas. No. 11,657. To be valid, a custom must be not only established and reasonable, but certain and definite. One of the libelant's witnesses, for example, testified that the custom calls for a discharge of 25,000 to 30,000 feet; one of the respondents' witnesses, in like manner, testified to a customary rate of 17,000 to 20,000. I do not think either custom is possible. There might be a definite rate of discharging lumber fixed by custom for the sake of convenience, as 100 tons a day, Sundays excepted, is said to be the customary rate for the discharge of coal. See *Thacher v. Gas-Light Co.*, 2 Low. 361, 364, Fed. Cas. No. 13,850. A custom which fixes the rate at from 17,000 to 20,000 feet, however, is an impossibility, unless the minimum is the privilege of one party and the maximum that of the other, or unless the custom defines the circumstances under which every rate between the maximum and minimum becomes customary. Neither condition exists here, and the meaning attached to the words "custom" and "customary" is well defined by the witness Childs:

"The point has been raised here on the words 'customary,' 'average,' 'usual.' The way that I look at the three words is that they are practically one word. 'Customary' means the average or usual dispatch at the port at which the vessel discharges. That is the term that is used among the brokers and the merchants in every port where the vessels go. The word 'customary' is considered to mean what is the average or usual time for unloading at that port."

The testimony given on both sides is therefore valuable only as it shows what are the limits, under ordinary circumstances, of a reasonable rate of discharge of this kind of lumber within the port of Boston. It does not establish a definite rate, or obviate the necessity of considering the circumstances of each case.

The charter party in this case gave the respondents "one clear day" in which to provide a berth for the schooner. I need not here determine precisely what these words mean under all circumstances. In this case they bound the respondents to furnish a berth where the Baird

could discharge throughout the whole of May 23d. In fact, no berth was furnished until May 26th, and the libelant lost the use of May 23d and May 25th, except so far as he employed them in discharging the timber, something less than half a day's work. It is practically admitted that no discharge is to be expected on Sundays and holidays, and, so far as kiln-dried lumber under deck is concerned, I think it is fairly established that no discharge is to be expected on rainy days. I hesitate to apply this exception to a deck load, even of kiln-dried flooring, which has been carried from Pascagoula to Boston; but as there is no evidence whether the failure to discharge on May 26th was caused by the stevedore or by the consignee, and as no one is shown to have asked for discharge on that day, I shall allow no demurrage for it. Discharge was continued on every other week day that the schooner lay at Mystic Wharf, including May 30th. Presumably it was permitted on that day for the convenience of both parties, and the discharge upon a holiday leaves the case as if the schooner had so much less cargo to discharge on her stipulated lay days.

The libelant contends that the discharge was hindered at Mystic Wharf by its inconvenient arrangement and management, and by the inability of the surveyor properly to keep up with the stevedore. The evidence to this effect is not very definite. That Mystic Wharf is somewhat less convenient than other wharves in Boston appears pretty plainly, and the rate of discharge thereat seems to be somewhat lower than at some other wharves. I am not convinced, however, either by the evidence or by the argument, that a reasonable rate of discharge is necessarily the same at all wharves and under all circumstances. The wharves in Boston are not, in fact, equally convenient for the discharge of every sort of cargo, and no custom has been proved which requires me to disregard the difference among them. Doubtless a wharf may be so inconveniently arranged or constructed that the consignee will be responsible for the delay in discharging thereat, but the reasonable convenience required of a wharf is not the same thing as the highest degree of convenience either imaginable or actually existing. Taking everything together, I think that the libelant was improperly delayed at Mystic Wharf somewhat, but not very much. I allow a day and a half before discharge began and one day thereafter.

The removal to the respondents' wharf was by the orders of the respondents, and for the delay caused thereby they are responsible. The evidence does not show distinctly how much delay was caused by the moving and by the inability to bring the vessel immediately alongside. Evidently it was small, and I shall allow only an additional half day's demurrage therefor. The vessel having been thus delayed three working days by the fault of the respondents, it follows that she ought to have finished her discharge by June 12th instead of June 16th, and there must be a decree for four days' demurrage, as one Sunday intervened. To recapitulate, I think the Baird should have been discharged on May 23d, 25th, 27th, 28th, 29th, 30th (by the assent of both parties), June 1st, 2d, 3d, 4th, 5th, 6th, 9th, 11th, 12th. May 24th and 31st and June 7th were Sundays. On May 26th and June 8th and 10th it rained.

Decree accordingly.

LEWIS et al. v. JOHNSON.

(Circuit Court, D. Washington, N. D. December 1, 1898.)

JURISDICTION—TRANSFER OF CAUSE FROM DISTRICT COURT OF ALASKA.

Rev. St. §§ 601, 637, providing for the transfer by a district court of a cause in which the judge is interested or has been counsel "to the next circuit court for the district; and if there be no circuit court therein, to the next circuit court in the state; and if there be no circuit court in the state, to the next circuit court in an adjoining state,"—do not authorize the transfer of a cause from the district court of Alaska to a circuit court in the district of Washington, as, though the district court of Alaska be considered as within the terms of the statute, Washington cannot be held to be an "adjoining state."

Heard on Objections to Jurisdiction.

George E. Wright and R. F. Lewis, for complainants.

S. H. Piles, for defendant.

HANFORD, District Judge. This suit was commenced in the United States district court for Alaska, and was pending therein when Hon. C. S. Johnson became judge of that court. Judge Johnson was an attorney for the complainants until a short time before his induction into office, when, by an order of the court, he was permitted to withdraw from all cases in which he appeared as an attorney. He is the sole judge of the only court in Alaska having jurisdiction of the controversy. The complainants finding themselves in the predicament of having a case in a court the judge of which is disqualified to hear and decide it, they sought to obtain relief by moving to transfer it to this court, under the provisions of sections 601, 637, Rev. St. U. S. These statutes provide, in effect, that whenever the judge of any district court is interested in any suit pending therein, or has been of counsel for either party, or is related to or connected with either party, it shall be his duty, on application of either party, to cause the fact to be entered on the records of the court, and to order that an authenticated copy of the record "be forthwith certified to the next circuit court for the district; and if there be no circuit court therein, to the next circuit court in the state; and if there be no circuit court in the state, to the next convenient circuit court in an adjoining state; and the circuit court shall, upon the filing of such record with its clerk, take cognizance of and proceed to hear the case, in like manner as if it had originally and rightfully been commenced therein." Upon a hearing, the district court for Alaska granted the motion, and caused the record to be made and the cause certified to this court in accordance with the statute. A certified transcript of the order transferring the case, together with what appears to be the original papers, has been certified to this court, the cause has been docketed, the complainants have entered a general appearance by their attorneys, and the defendant has appeared specially by his attorney, and filed objections to any proceedings in this court, on the ground that the court has not jurisdiction of the parties or the controversy. This court cannot take jurisdiction of the cause merely for the sake of accommodating the parties. Unless all the conditions necessary to bring the case within the terms of an act of congress conferring jurisdiction upon the court exist, the

court is without power to proceed. Sections 601 and 637 have reference to district courts and circuit courts, within the states of the Union, organized under laws enacted pursuant to the judiciary article of our national constitution, and those sections do not comprehend legislative courts, organized within the territories belonging to the United States under laws enacted by congress providing forms of government for such territories. The character of the district court for Alaska, and its relationship to our national judiciary system, is defined in the decisions of the supreme court in *McAllister v. U. S.*, 141 U. S. 174-201, 11 Sup. Ct. 949; *In re Cooper*, 143 U. S. 472-513, 12 Sup. Ct. 453; *The Coquitlam v. U. S.*, 163 U. S. 346-353, 16 Sup. Ct. 1117. Although said court is not a district court, comprehended within the statutes above referred to, still the law under which it was organized confers upon it all the powers of constitutional district courts. See the act entitled "An act providing a civil government for Alaska," approved May 17, 1884 (1 Supp. Rev. St. U. S. [2d Ed.] p. 431). The language of the statute defining the jurisdiction is broad and comprehensive, and I should have no difficulty in holding that, under the circumstances described, that court could transfer a case to this court, if this were a circuit court in an adjoining state. It is to be observed that section 601 does not authorize the transfer of a case from a district court into any circuit court, or into the most conveniently situated circuit court. The only circuit court authorized to take jurisdiction is a circuit court of the same district; or, if there be no such circuit court, then a circuit court in the same state; or, if there be no circuit court in the same state, then "the next convenient circuit court in an adjoining state." There is no state adjoining the district of Alaska. The state of Washington is the nearest in proximity to Alaska of any state in the Union, but between it and Alaska there intervenes a strip of foreign territory several hundred miles in width. It is not permissible for courts, in deciding questions as to their own jurisdiction, to give to a word in the law defining its jurisdiction a meaning more expansive than its usual and ordinarily understood definition, so as to assume a wider range of jurisdiction. On the contrary, the rule of strict construction must be applied. Congress might have authorized the transfer of a cause from the district court to the circuit court most convenient for the parties to attend, or it could have directed the transfer to be made to a circuit court in a neighboring state; but, instead of doing so, it has prescribed the rule that, if there be no circuit court within the state, the transfer must be made to a circuit court which must be not only convenient, but in an adjoining state. This means a state having a common boundary line with the district from which the case is to be transferred. The definition of the word "adjoining" is to lie or be next to or in contact. *Webst. Dict.*; *Crabbe, Eng. Synonyms*; *Fernald, Eng. Synonyms*; 1 *Am. & Eng. Enc. Law* (2d Ed.) 635, note 1, and numerous authorities therein cited.

I am forced to conclude that the transfer of this case from the court in which it was commenced to any other court has not been provided for by law, and that this court is not authorized to exercise jurisdiction, and it will therefore be ordered that the case be remanded to the United States district court for Alaska.

In re ASPINWALL'S ESTATE.

(Circuit Court of Appeals, Third Circuit. November 21, 1898.)

No. 45, September Term.

1. CIRCUIT COURT OF APPEALS—JURISDICTION—CASE INVOLVING JURISDICTION OF CIRCUIT COURT.

Where a circuit court remands a cause to the state court on the ground of a lack of jurisdiction to take cognizance of it, the case is one in which the jurisdiction of a circuit court is in issue, within the terms of section 5 of the act creating the circuit court of appeals, and is therefore excluded by section 6 from the cases of which that court is given jurisdiction by such section.

2. APPEALABLE ORDERS—REMANDING CAUSE—CIRCUIT COURT OF APPEALS ACT.

The provision of the judiciary act of August 13, 1888, that no appeal shall lie from an order of the circuit court remanding a cause to a state court, was not repealed by the act of March 3, 1891, creating the circuit courts of appeals. In re Coe, 1 C. C. A. 326, 49 Fed. 481, followed.

3. CIRCUIT COURT OF APPEALS—JURISDICTIONAL QUESTIONS—FOLLOWING DECISIONS IN OTHER CIRCUITS.

Where a circuit court of appeals for one circuit has determined a question of its own jurisdiction, the circuit courts of appeals for others circuits should follow its decision, for the sake of uniformity of decision on jurisdictional questions, until the question has been settled by the supreme court.

Bradford, District Judge, dissenting, on last point.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

On motion to dismiss appeal.

Wm. Drayton and John P. Johnson, for the motion.

D. T. Watson, opposed.

Before DALLAS, Circuit Judge, and BUTLER and BRADFORD, District Judges.

DALLAS, Circuit Judge. When this case was reached at the present term, it appeared that a motion to dismiss the appeal had been interposed; and that motion, after argument, it was announced would be granted. No formal dismissal of the appeal was, however, then entered, because we thought that the order should be accompanied by a statement of the grounds upon which it was based. Such a statement will now be made, but very briefly, and without elaboration.

1. The decision of the circuit court, which was appealed from, adjudged that the proceeding, which had been brought into that court by removal from the orphans' court of Allegheny county, Pa., should be remanded to the last-mentioned court. 83 Fed. 851. The remanding order was expressly founded solely upon the lack of jurisdiction in the circuit court to take cognizance of the cause; and the question before us is, has this court jurisdiction to review such a decision of the circuit court? If it has, it must be because it is conferred upon it by section 6 of the act of March 3, 1891. Now, by that section it is provided that the circuit courts of appeals shall exercise appellate jurisdiction to review final decisions of the circuit courts only in cases other than those provided for in section 5 of the same act; and, turning to section 5, we find it to be there provided that appeals or writs of error may be taken

from the circuit courts direct to the supreme court in any case in which the jurisdiction of a circuit court is in issue. We are all of opinion that the necessary effect of these provisions is to deny to this court the jurisdiction which in this case it has been asked to assume.

2. This question was before the circuit court of appeals for the First circuit in *Re Coe*, 1 C. C. A. 326, 49 Fed. 481; and it was there held that the disallowance of an appeal from an order remanding a cause to the state court in which it had originated was proper. It has been urged in argument that the reasons given for the judgment in that case are unsound, but that contention is, in our view of the matter, irrelevant. We believe it to be our duty to follow that judgment, not for the reasons assigned in its support, which it is not necessary either to adopt or to reject, but because uniformity of decision amongst the several courts of appeals upon such a jurisdictional question seems to us to be of paramount importance. It will not result from acceptance of this view of the subject that an error once committed would be indefinitely perpetuated, for the supreme court may at any time settle such questions for all the courts of appeals alike. An order will now be entered dismissing the appeal, with costs.

BRADFORD, District Judge. I fully concur with the majority of the court in the dismissal of the appeal. We are all satisfied that the provisions of the act of March 3, 1891, creating the circuit courts of appeals, do not confer upon them power to entertain an appeal from the order of a circuit court remanding a cause to a state court for want of jurisdiction in the circuit court. This is admittedly a safe and sufficient ground to support the order of dismissal. But the majority of the court, after stating that "we are all of opinion that the necessary effect of these provisions is to deny to this court the jurisdiction which in this case it has been asked to assume," have unnecessarily adopted a further and independent ground on which to base the action of the court. This unnecessary and cumulative position embodies, in my judgment, such unsound and mischievous doctrine that I am not willing by silence on my part to be understood as acquiescing in its enunciation as law. Briefly stated, it is that the fact that the circuit court of appeals for the first circuit decided in the case of *In re Coe*, 1 C. C. A. 326, 49 Fed. 481, that the disallowance of an appeal from an order remanding a cause from a circuit court to a state court was proper, makes it the duty of this court to follow the judgment of that court, and dismiss the appeal for the reason that as stated by the majority of the court, "uniformity of decision amongst the several courts of appeals upon such a jurisdictional question seems to us to be of paramount importance." All questions as to the soundness or unsoundness of the reasons given for that judgment are to be treated as "irrelevant," and it is the fact of the rendition of the judgment, and not its accordance with law, which imposes upon this court the duty of paying to it as a precedent, not on any rule of property, but on a question merely of jurisdiction, the homage of unquestioning submission in another case and in a different circuit. The logical result of this position is that the first decision made by any circuit court of appeals on a question of its jurisdiction, whether sound or unsound, establishes a practically

imperative rule for the government of all other circuit courts of appeals in their treatment of the same question, without regard to their convictions on the subject. This, in my judgment, is novel doctrine which neither reason nor authority supports. The circuit courts of appeals, as between themselves, are tribunals of co-ordinate jurisdiction, possessing equal dignity and authority. The same is true of circuit courts and also of district courts. The legitimate function of all of them is to administer justice according to law. It would be a startling proposition that a decision by any one of the sixty or seventy district courts on a question of its jurisdiction, raised for the first time, should operate as a binding precedent in all other district courts, although believed by them to be contrary to settled principles of law. Similar considerations would apply to the determination of a new jurisdictional question by a circuit court. I fail to perceive any ground on which circuit courts of appeals can or should be differentiated from circuit courts or district courts in this regard. Of course, no lawyer would assert that, in the absence of a statute in that behalf, a judgment of a court on a given question per se controls another and independent court of co-ordinate jurisdiction and equal authority in dealing with the same question in a different case. Such a contention would be wholly inadmissible, and is not arguable. If, therefore, the effect of a binding precedent is properly to be given in the latter court to the judgment erroneously rendered in the former, between different parties, some principle of public policy, or judicial propriety or comity must require such recognition of the judgment. I cannot conceive, however, that any principle of public policy or consideration of judicial propriety or comity can legitimately be invoked to sustain the doctrine of the majority that it is the duty of this court to follow an unsound decision of any other circuit court of appeals on merely a jurisdictional question.

Judicial decisions by or on the strength of which titles to realty or personality have been acquired may, through their number or general acquiescence therein by the public, become rules of property, which courts will not disturb, although satisfied that they do not rest upon sound principles. In such a case a wise policy requires uniformity of decision, as it is less important that the rule should be consistent with principle than that it should be certain. So, similar considerations may apply to decisions recognizing or enforcing contractual rights, or liens, or relating to certain other subjects. But this doctrine has its limitations. In the case of *The Madrid*, 40 Fed. 677, where it was held that a statutory lien on a vessel for supplies furnished to her at her home port was entitled to preference over a mortgage of the vessel to secure her purchase money, Mr. Justice Lamar, in delivering the opinion of the court, said:

"Counsel for the mortgagees rely mainly upon the doctrine of *stare decisis* to support the claim of their clients. Their contention is, that the rule of law heretofore announced in this circuit should stand, because, as they assert, rights of property have been acquired under it and vested rights will be disturbed by any change. On the other hand, it is strenuously insisted by counsel for the material-men that the decisions of this circuit upon the general question under consideration are erroneous, and should not be followed. * * * The rule of *stare decisis* means, in general, that when a point has been once settled by judicial decision it forms a precedent for the guidance of

courts in similar cases. * * * This rule should, in the main, be strictly adhered to. An adherence to it is necessary to preserve the certainty, the stability and the symmetry of our jurisprudence. Nevertheless there are occasions when a departure from it is rendered necessary in order to vindicate plain and obvious principles of law, and to remedy a continued injustice. These are the two grounds of justification in departing from a decision which has become a precedent."

It will be observed that in the above case the court departed from precedents established by itself as well as by other tribunals. There can be no doubt that a departure would have been taken with even less hesitation from precedents established solely by other courts possessing only co-ordinate jurisdiction and authority.

It should require very cogent reasons to induce a court to abandon the principles of law or equity applicable to a question before it for decision and to base its judgment on unsound precedents made by other courts of only equal authority. Such a course can never be justified unless the precedents have been so acted upon or recognized that the evil which would result from disregarding them would clearly outweigh the good to be derived from an adherence to sound principles. Where such a case exists the law may, for the prevention of hardship or injustice, not only justify but demand a decision not in accord with right reason or correct principles; or to employ other terms, what would otherwise violate sound principles of law may, under certain circumstances, for the prevention of hardship or injustice, become lawful. To such an extent only can principle properly be sacrificed to uniformity of decision. In my judgment, while it is desirable, it is not of paramount importance as supposed by the majority of the court, that there should be uniformity of decision upon the point whether a circuit court of appeals has jurisdiction to entertain an appeal from an order of a circuit court remanding a cause to a state court for want of jurisdiction. The question presented does not, directly or indirectly, affect any rule of property, or relate to the existence or enforcement of liens, or touch contractual or personal rights. It does not in the least involve the substantial merits of the original cause, or, indeed, the right of the court below to decide whether it had jurisdiction over the cause removed into it from the state court. The question goes simply to the power of this court to review the decision of the circuit court upon the point of jurisdiction. The decision, whatever it may be, cannot deprive the parties to the controversy, or either of them, of the right and opportunity to have the case decided by a court of competent jurisdiction, whether that court should be held to be, on the one hand, a circuit court, or, on the other, a state court. A lack of uniformity of decision on this point in the different circuit courts, should it be displayed, would, while undesirable, not be a subject of apprehension, or a source of hardship or injustice. Until a uniform rule should be established by a decision of the supreme court, each circuit court of appeals would, within its own circuit, and in accordance with its views of the law, entertain or decline to entertain jurisdiction, as the case might be, and settle and render certain the law on the subject in such circuit accordingly.

It is true, as suggested by the majority of the court, that an error committed by a circuit court of appeals in the decision of such a jurisdictional question need not be "indefinitely perpetuated, for the supreme

court may, at any time, settle such questions for all the courts of appeals alike." But in this connection it is pertinent to observe, first, that if the original decision be erroneous, and be followed by all other circuit courts of appeals in which the question arises, it is not probable, other things being equal, that the error will be corrected by the supreme court as soon as it would be were there a diversity of decisions on the same question; and, secondly, that the unanimous adoption of the erroneous decision by other circuit courts of appeals would have a tendency, other things being equal, to cause the supreme court, not to correct, but indefinitely to perpetuate the error, in so far as that court may be influenced by uniformity of decision by circuit courts of appeals. This doctrine of the duty of following erroneous decisions, and especially recent erroneous decisions, of jurisdictional questions by courts of coordinate authority, is, in my judgment, vicious in principle, and involves a degree of self-effacement on the part of judicial tribunals, and a misuse of their proper functions, uncalled for by any consideration of public policy, or of judicial propriety or comity.

I have found no authority at variance with the views here expressed. In the case of *Beach v. Hobbs*, 82 Fed. 916, however, language was used by the circuit court in Massachusetts which, taken by itself, lends some color to the doctrine I have been criticising. It was there said:

"So far as any proposition may be fully presented to the court of appeals in any circuit, and determined by it, resulting in a rule which is, and ought to be, of general application, especially when it involves federal questions, a condition of adjudications which would defeat uniformity throughout the United States would clearly disappoint the contemplation of congress in establishing those tribunals. * * * A decision of the circuit court of appeals in any circuit, so long as it remains unappealed from, and so long as the supreme court has not issued its writ of certiorari to re-examine it, must be regarded as having more effect than that ordinarily given to even the highest state tribunals, or to any court of merely concurrent jurisdiction, no matter how great its learning. There seems to be no method of maintaining the necessary uniformity of the law with reference to general questions, especially federal questions, unless the mature and solemn judgments of a circuit court of appeals in any circuit are accepted as authoritative declarations of the law, subject only to such criticisms on the score of oversight or evident mistake as would apply to a judgment of the circuit court of appeals in the particular circuit where the litigation then under determination may be pending."

In considering this language three things should be borne in mind. First, that the case did not involve any question of jurisdiction, but related to the validity of a patent for an invention; such patents being "intended by statute to have effect throughout the whole country," and special rules as to the effect of former decisions between other parties applying to them upon the question of their validity. Second, that the language quoted was not necessary to the determination of the case, and was obiter dictum, the court saying:

"We are not, however, required to definitely determine the effect of these considerations in the case at bar, because, to the extent that the court of appeals for the second circuit has reached necessary conclusions in reference to the patent at issue, they meet our approval so far as they concern the condition of the case as it stands before us."

Third, that the doctrine embodied in the language first above quoted from *Beach v. Hobbs*, certainly aside from its application to patents, goes far beyond the doctrine laid down by the circuit court of appeals

for the first circuit in *Beal v. City of Somerville*, 1 C. C. A. 598, 50 Fed. 647; the latter court remarking that "if the question at issue had been met by the United States circuit court of appeals in any other circuit we should, of course, lean strongly to harmonize with it," but not intimating that it would feel bound to follow such a decision, against its own legal convictions.

In what has been said I do not wish to be understood as in any manner criticising or reflecting upon either the judgment or reasoning in the case of *In re Coe*, 1 C. C. A. 326, 49 Fed. 481. My remarks have been directed solely against what I consider to be unsound doctrine practically enunciated, without any necessity, by the majority of this court in its treatment of that case in the second ground of dismissal of the appeal.

TOLEDO LIBERAL SHOOTING CO. et al. v. ERIE SHOOTING CLUB.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1898.)

No. 567.

NAVIGABLE WATERS—TEST OF NAVIGABILITY.

In this country, waters, to be navigable in law, must be capable of navigation in fact as highways for the transportation of commerce. A bay or arm of one of the Great Lakes, some 4,000 acres in extent, which was patented to the state as swamp land, and which, though of sufficient depth for navigation where it opens into the lake, is throughout the remainder of its extent of an average depth of not more than 2 feet, and rarely more than 3 feet, and is covered through the summer with grass and rushes, is not navigable water, but merely a marsh, and subject to private ownership.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

The Erie Shooting Club, the complainant below, is a shooting club incorporated under the law of Michigan. The object of the incorporation was to secure, hold, and protect suitable territory for hunting and fishing for the exclusive use of its members. In pursuance of this purpose, it has acquired by lease between three and four thousand acres of land, with the exclusive right to hunt and shoot thereon the wild game and fowl which might frequent said property. The lands thus secured belong in fee to its members, who have leased to the club the exclusive rights mentioned. These lands consist of the shores and submerged lands constituting a shallow, marshy body of water, called "Maumee Bay," a bay or arm of Lake Erie, and lie in Monroe county, Mich. These submerged lands were surveyed and platted and patented to the state of Michigan as swamp or overflowed lands, under the swamp land act of 1850. By grants from the state, and through mesne conveyances, all the lands included within its shores, including two small islands, have become private property. The Toledo Liberal Shooting Company is an incorporation of Ohio, and, like the Erie Shooting Club, is organized for the purpose of holding and protecting lands for the exclusive use of its members as a preserve for wild game, etc. It holds under lease about 106 acres of submerged lands in about the center of Maumee Bay, and entirely surrounded by the submerged lands held under lease by the Erie Shooting Club. With this exception, the Erie Shooting Club holds leases to the entire body of submerged lands within the shores of Maumee Bay, and also holds leases which include the shores of said bay and two small islands therein,—one known as "Indian Island," and containing about 36 acres, and the other known as "Card Island," with an area of about 20 acres. The entire holdings of submerged and dry lands by the said Erie Shooting Club is between three and four thousand acres, much the greater part being submerged lands.

The bill of the Erie Shooting Club represented that the Toledo Liberal Shooting Company, by its officers and members, was trespassing upon its property, by entering same "with boats and otherwise," "and had with guns shot and killed, destroyed, and scared away wild ducks and other wild water fowl thereon, both before and after sunrise, and at other times." This they are charged with as having frequently done, and against the protests and objections of complainant, and that "they threaten to continue so to do," etc. Other averments are also made as to the frequency with which this conduct has been persisted in, and as to the injury done and threatened to be done to the property of complainant. The prayer of the bill was that the defendants be enjoined perpetually from entering upon the said property, and from trespassing thereon, by shooting or otherwise destroying the wild fowl thereon. Certain individuals, being officers and members of the Toledo Club, were joined as defendants, and like relief was sought against them. The Toledo Club and its members made defendants joined in defending, and by answer denied that they collectively or individually had been guilty of trespassing upon complainant's property, by shooting thereon, or by entering upon any dry land owned or rented by complainant. They assert that the submerged lands claimed by complainant are lands under navigable waters, and deny that any exclusive right to navigate said waters has been conferred upon complainant, its members, or the lessors under whom they hold, and assert the right to go on and over said water in any way or direction for the purpose of reaching and hunting upon their own submerged lands. The answer admits that complainant has "the exclusive right to the game or wild fowl found on or over" the lands lawfully held by it under lease or otherwise. Much proof was taken, both as to the character and frequency of the alleged acts of trespass committed by the defendants, and as to the character of the water constituting Maumee Bay. Upon a final hearing, the circuit court granted a perpetual injunction restraining defendants from entering upon the waters covering the submerged lands leased by complainant, in boats or otherwise, save by a prescribed route definitely fixed by the decree, and for the sole purpose of reaching the submerged lands leased by the defendant corporation. The decree also specifically and perpetually enjoined the defendants, their licensees or agents, from "hunting or shooting with guns," or in any manner "killing or taking wild fowl of any kind upon or over the water covering the lands of complainant." From this decree, defendants have appealed.

Willis Baldwin, for appellants.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

This decree must be affirmed. The contention that the waters covering the submerged part of the lands claimed under lease by the Erie Shooting Club are navigable, and therefore subject to the public right of navigation, is not supported by the evidence in this record. The fact that this so-called "bay" was surveyed and platted as swamp land by the government affords a strong presumption against the navigability of the water thereon. This survey was under the authority of the government, which subsequently conveyed the lands so platted to the state of Michigan as swamp lands, under the act of September, 1850, known as the "Swamp Land Act." That the state subsequently conveyed them is a further circumstance tending to establish that no public easement had or could exist therein by reason of the navigability of the waters thereon.

Just where the so-called "bay" opens into the lake, at its southeast end, there is water navigable for ordinary commercial purposes. This channel rapidly shallows as the bay is penetrated. From a line drawn

east and west through the center of sections 34 and 35 to the extreme northern end of this bay, a distance of over three miles, the average depth of water will not exceed two feet. There are places in which it is deeper, but in these it rarely exceeds three feet. There are large sections within the area mentioned, where the water does not average twelve inches; and considerable parts, especially in section 27, where it is not six inches in depth, except under unusual winds or freshets. An effort has been made to show that there are deeper and navigable channels permeating this shallow marsh. Several small creeks empty into this bay. The channels of one or more of these may be traced with difficulty in parts of the marsh. They soon cease to have any defined banks, and are lost in the wider waters, whose level is affected by the fluctuations of the lake. It is impossible upon this evidence to say that any one of these so-called "channels" is navigable. Their continuity is insufficient, and the proof as to their course and depth is altogether too slender and contradictory to justify a reversal of the decree below. From June to October, this body of water is covered with a mass of aquatic vegetation, such as wild rice, rushes, etc. It is then impenetrable, save by the laborious method of punting. At no time is the greater part of this marsh susceptible of supporting "commerce," in any reasonable sense of the term. That the water stands permanently, and that it has a deep opening into Lake Erie, does not establish that this shallow body of water is capable of sustaining commerce, or is burdened with a public use. It is nothing more or less than a marsh opening into the lake. To be navigable in law, it must be navigable in fact; that is, capable of being used by the public as a highway for the transportation of commerce.

None of the characteristics of commercial navigability are shown here. It is the natural feeding ground of the duck and other water fowl. In their pursuit by canoe and flat-bottomed ducking boats the water may be navigated. That is not commerce, and proves nothing. The same test would convert every pond and swamp capable of floating a boat into a navigable stream or lake. This bay is not a highway, never has been, and can never be. At the common law the term "navigable" had a technical meaning, and was applied to all streams or bodies of water in which the tide ebbed and flowed. All such waters were public. That definition is not applicable in this country, and all waters are held navigable in law, and subject to a public use, which are by their character capable of use as highways, for purposes useful to trade or agriculture. It is the capability of being navigated for useful purposes, which is the test. Gould, *Waters*, § 54, and cases cited; *Barney v. Keokuk*, 94 U. S. 324; *The Daniel Ball*, 10 Wall. 557-563; *The Montello*, 20 Wall. 430-441; *Moore v. Sanborne*, 2 Mich. 519; *Chisolm v. Caines*, 67 Fed. 285; *City of Grand Rapids v. Powers*, 89 Mich. 94, 50 N. W. 661; *Hall v. Alford* (Mich.) 72 N. W. 137; *Rowe v. Bridge Corp.*, 21 Pick. 344; *Attorney General v. Woods*, 108 Mass. 436.

In the case of *The Montello*, cited above, the court said:

"The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or

highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are or may become the mode by which a vast commerce can be conducted; and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable; but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'"

If this is a private property, it must follow that appellants have no right to trespass thereon. Their own property being inaccessible, save by going over that of appellee, entitles them to a way of necessity. That they obtained by the decree below. Decree affirmed.

METROPOLITAN TRUST CO. OF CITY OF NEW YORK v. HOUSTON & T. C. R. CO. et al. (ten cases).

(Circuit Court, W. D. Texas. December 1, 1898.)

Nos. 228, 220-227, 229.

1. CARRIERS—STATE REGULATION OF RATES—CONSTITUTIONAL RESTRICTIONS.

A state has power to regulate and fix rates and fares to be charged by public carriers for the carriage of freight and passengers between points within its limits, subject to the limitation that such rates and fares shall not so reduce the earnings of the carrier below what reasonable rates would produce as to deprive it of its property without due process of law, or deny it the equal protection of the laws.

2. SAME—FIXING RATES—ALLOWANCE FOR BETTERMENTS.

State authorities, in fixing rates to be charged by railroads, should take into consideration betterments and replacements made necessary by the growth of traffic, such as replacing wooden by iron bridges, and similar expenditures beyond ordinary repairs, which must be met from the gross earnings.

8. SAME—VALUATION OF RAILROAD PROPERTY—ELEMENTS OF VALUE.

The value of a railroad, like that of any other business property, may be a matter of growth; and its location, good will, and established business are elements to be considered in determining such value. It may have been constructed at a time when the condition of the country which it traverses was such as to give no reasonable expectation of immediate profitable earnings, and have been maintained and operated for years without profit to its owners, who may legitimately have relied on the future development of the adjacent territory and of traffic to render the property eventually valuable and profitable; and in such case a mere estimate of the cost of replacing the physical structures of the road is too narrow a basis upon which to determine its value, as the capital on which its owners are entitled to earn dividends, and as the basis for the fixing of rates by the state for the carriage of freight and passengers.

On Motion for Injunction Pendente Lite.

These are 10 suits in equity, as follows: Metropolitan Trust Company of the City of New York, trustee, against the Houston & Texas Central Railroad Company and others; the Mercantile Trust Company, trustee, respectively against the St. Louis Southwestern Railway Company of Texas and others, the Tyler Southeastern Railway Company of Texas and others, the Texas & Pacific Railway Company and others, and the International & Great Northern Railroad Company and others; the Central Trust Company of New York, trustee, respectively against the San Antonio & Aransas Pass Railway Company and others, and the Missouri, Kansas & Texas Railway Company of Texas and others; Farmers' Loan & Trust Company, trustee, against the Gulf,

Colorado & Santa Fé Railway Company and others; James J. McComb against the Galveston, Harrisburg & San Antonio Railway Company and others; and Frank Storrs and William P. Hillhouse, trustees, against the same. The members of the railroad commission of Texas and the attorney general of the state were made parties defendant in each suit, the object of which is to restrain the enforcement of certain tariff schedules fixing freight rates promulgated by the defendant commission. Heard on motion for injunction pendente lite.

Farrar, Jonas, Kruttschnitt & Gurley, for complainant.

Baker, Botts, Baker & Lovett, for defendant Railway Co.

M. M. Crane and F. A. Fuller, for Reagan and others.

McCORMICK, Circuit Judge. The constitution of Texas, as amended in 1890 (Const. art. 10, § 2), provides:

"Railroads heretofore constructed or which may hereafter be constructed in this state are hereby declared public highways and railroad companies common carriers. The legislature shall pass laws to regulate railroad freight and passenger tariffs, to correct abuses, prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce the same by adequate penalties, and to the further accomplishment of these objects and purposes may provide and establish all requisite means and agencies, invested with such powers as may be deemed adequate and advisable."

In execution of that provision of the constitution, the legislature of Texas passed an act to establish a railroad commission for the state, which act was approved April 3, 1891. Under it the commission was constituted, and began its work by promulgating tariffs for the carriage of freight from one point to another in the state. A number of tariffs, embracing substantially all the commodities which were the subject of freight charges in this state, were promulgated between the constitution of the commission and the 29th day of April, 1892, on which date the creditors of five of the railroads made parties defendant in the suits, the caption of which is given at the head of this opinion, exhibited their bills of complaint against the railroads, and against the members of the commission and the attorney general, exhibiting also the rates that had been promulgated by the commission and adopted by the railroads, and complaining that the rates were unreasonably low, were not compensatory, and were effecting and would effect the confiscation of the rights and properties of the complainant in the railroads, and in the securities thereof of which the complainant was a holder, and would take the property from the complainant's rightful use, and appropriate it to the benefit of the public, without due process of law, and without allowing to the complainant's rights therein the just protection of the laws. On these bills, and after due notice to the defendants, a motion for an injunction pendente lite was presented to me, and heard in July, 1892. The defendant railroad companies answered, admitting substantially the allegations in the bills of complaint. They also took leave and filed cross bills, in which they set up substantially the same matters, and prayed for the same relief, as was pleaded and asked in the original bills. The defendants the railroad commissioners and the attorney general also answered fully, substantially denying the gravamen of the charges made by the original and the cross bills. After a full hearing the injunction pendente lite, substantially as prayed for, was granted, which at the hearing was perpetuated and made final. From this decree the commis-

sioners and the attorney general appealed to the supreme court; and so much of the decree of the circuit court as restrained the enforcement of the rates which had been established by the railroad commission, and which were attacked in those suits, was affirmed. For a further statement of these cases I refer to the report thereof in 154 U. S. 362-420, 14 Sup. Ct. 1047-1062. In August, 1894, the railroad commission began to make and establish new rates, tariffs, schedules, classifications, and orders, which they promulgated and intended as schedules of rates of charges for the transportation of the articles named therein over the railways of the state, with modifications and exceptions as to certain of the railways and parts of railways set out in their published tariffs and circulars affecting the same. The rates established are not maximum rates, but in each instance are absolute rates, from which the carrier is not permitted to depart without previously obtained leave of the commission. The hearings before the commission, and the action thereof, have been almost continuous from August, 1894, to the 31st of October, 1898, when these bills were exhibited. On the 6th day of October, 1898, the commission had published a new tariff affecting the carriage of cotton in bales, which was to take effect, by a subsequent order postponing the date, on the 1st of November. The commission had also issued notice of other hearings to be had looking to the reduction of rates on other commodities, entering largely into the tonnage of the different carriers. The bills, duly verified, and supported by other affidavits, and accompanied by exhibits showing the rates that had been propounded and put into effect, and the rate that was to go into effect on the 1st day of November, were submitted to me on the 31st of October, with an application for a restraining order to prevent the going into effect of the new commodity tariff, I—C, cotton in bales, until the hearing of the motion for injunction. The application was granted, and a restraining order issued in conformity thereto.

The bills in these 10 cases are substantially similar. The details as to the construction, mileage, incumbrances, and net earnings of the various roads differ, of course, the one from the other. The substance, however, in each case, substantially shows the history of the construction or acquisition of the railroads, the operation and betterments, and the actual cost thereof, as nearly as it can be known or estimated, the capitalization of each, and the effect upon the net earnings of each by the rates fixed and enforced by the commission, showing in each case that the rates theretofore established voluntarily by the railway companies were reasonable, and such as competitive, commercial, and financial conditions warranted and required; that the system of rates now enforced by the commission, and proposed to be enforced, is unreasonably low, and lower than the rates enjoined in the former suits, to which reference has been made, and will and have in each instance so reduced the net earnings of each of the roads that neither they nor any of them can earn, nor have earned, revenue sufficient to meet their running expenses, including replacements and repairs, and such betterments as the advancing business of the roads and the requirements of such traffic render necessary to be made, and to earn a reasonable compensation for the services rendered in the transportation of the freights moved. They allege that each and all of the rates,

rules, and regulations established by the railroad commission were made and established by the commission in pursuance of the design and purpose repeatedly avowed by it, and which are its settled policy, to reduce the rates of the railroad companies until they reach a level that will, when applied to the ordinary volume of traffic, yield to the company no more revenue than will be sufficient, after paying operating expenses and ordinary repairs, to pay a reasonable return in the way of interest or dividends on a sum which the commission has assumed and stated to be sufficient to construct a similar railroad at the present time; that in pursuance of this policy and design the railroad commission has made, in the manner pointed out in the bill, an estimate of the present value of each of the railways and its appurtenant property, and filed the same in the office of the secretary of state, and has repeatedly avowed that the sum thus ascertained was the limit of the amount upon which the companies should be entitled to earn returns. It is averred in the bills that this value fixed by the commission is in each instance greatly less than the actual cost of constructing, acquiring, equipping, and bringing to the present state of excellence the railways included in these suits, and is greatly less than the real value of each of said railroads. The bills are long, and embrace much detail which I have not thought it necessary to notice. They set out the operation of the tariffs imposed by the commission, and show such loss of net earnings occasioned thereby as prevents the most prosperous of the roads from earning a reasonable return on the value of its property, and a reasonable compensation for the services rendered, to an extent that, if continued, must result in the bankruptcy of the railroads, and their utter inability to keep their railways up to the standard required by the advancing and advanced stage of railroad transportation, and will result in the taking of the property without due process of law, and without affording to it the equal protection of the laws, in violation of the constitution of the United States; on which grounds they pray that the tariffs, rates, regulations, and orders establishing and enforcing this system of rates be enjoined.

The answer of the commission denies substantially all of the material allegations of the bill and cross bill in each case in which a cross bill was filed, and in the bill and the intervening petition of the Missouri, Kansas & Texas Railway Company in the case against the Missouri, Kansas & Texas Railway Company of Texas. It follows the bill, section by section, in each case; denying the substantial allegations, and making counter averments thereto, especially on the subject of the value of the railways and their equipments, and on the subject of their earnings as shown by their annual reports to the commission. In reference to the valuation of the roads, the defendants deny that the rates fixed by the railroad commission of Texas are fixed upon any arbitrary basis, except upon the basis of the actual value of the railroad property; and they allege that, in order to ascertain the value of said property, they did not fail to consider every element that would necessarily enter therein, including the actual cost of reproducing said road, the cost of the services of supervising engineers, legal counsel fees, and interest on the money invested during the period of construction; that to this end they caused an examination of said property to be made, and the valuation thereof to be made, as stated in the com-

plainant's bill of complaint; that the same was examined by a careful and experienced civil engineer, and that upon such examination estimates were made by such civil engineer on a consideration of all the facts connected therewith; that they notified the railroad company, as the law required them to do, that this valuation had been made, and invited them to make objections thereto, if objections they had; that 50 days were allowed the company to make objections to the valuation, and there were none made and none suggested by the company; that thereafter a statement of the valuation was filed with the secretary of state as required by law. Therefore these defendants say that the railroad company and the complainant are estopped from denying the correctness of the valuation therein made.

The Houston & Texas Central Railroad Company, the successor to the Houston & Texas Central Railway Company, has a mortgage indebtedness equal to about \$34,000 to the mile of its main line, and has stock outstanding to the amount of \$10,000,000, making its stock and bonds equal to the sum of about \$53,000 to the mile of its main line. The bill in this case avers that the defendant company and its predecessor company have necessarily expended in cash in the construction and equipment and betterment of the lines of the defendant company about \$62,000 per mile of its said railways; that the lines of railway of the defendant company have at all times been operated as economically as practicable; that its operating expenses have at all times been as reasonable and low in amount as they could be made by economy and judicious management; that the company has at all times secured the services of its officers and employes as cheaply as practicable, and has employed no more than was necessary, and at fair and reasonable rates of pay; that it has at all times secured all supplies, material, and property of every character used in the operation of its railways at the cheapest market price, and at rates as low as the same could be secured, and has secured and used no more than was actually necessary for the operation of its railways. Substantially the same allegation is made in the cross bill, and both are affirmed and sustained by affidavits of competent witnesses offered on the hearing of this motion. The valuation placed upon the property of this railroad corporation by the railroad commission of Texas is, in round numbers, \$21,000 per mile. This statement shows the vast difference between the estimates made by and on behalf of the railroad company and the estimates made by the railroad commission of the value of the railroad's property on which it is entitled to earn some profit. It seems to be clear from the answer of the commission, the tone of the affidavits which it offers in support of its answer, and the argument of the attorney general and the assistant attorney general who represented it on this hearing, that in estimating the value of this railroad property no allowance was made for the favorable location of the same, in view of the advance in prosperity of the country through which it runs, and the increment to its value due to the settling, seasoning, and permanent establishment of the railways, and to the established business and the good will connected with its business, which has been established through a long series of years, and all of which ought reasonably to be considered in fixing the value of the property and the capitalization upon which at least it is entitled to earn, and should pay, some returns

by way of interest or dividends. This is practically the oldest railroad in the state. A few miles of another road were built earlier, but this road, running throughout the whole course of its main line through what is now the most populous and best-developed portions of the state, and still rapidly increasing in population and development, has established a business that would not and could not be disregarded in estimating the value of the railroad, if considered solely as a business property and venture. It cannot be so considered, because of its quasi public nature. Its duties, its obligations, and its liability to control are elements that must be considered. As popularly expressed, the rights of the people—the rights of shippers who use it as a carrier—have to be regarded; but, as judicially expressed, these last have to be so regarded as not to disregard the inherent and reasonable rights of the projectors, proprietors, and operators of these carriers. It is settled that a state has the right, within the limitation of the constitution, to regulate fares. From the earliest times public carriers have been subject to similar regulations through general law administered by the courts, requiring that the rates for carriage should be reasonable, having regard to the cost to the carrier of the service, the value of the service to the shipper, and the rate at which such carriage is performed by other like carriers of similar commodities under substantially similar conditions. But neither at common law nor under the railroad commission law of Texas can the courts or the commission compel the carriers to submit to such a system of rates and charges as will so reduce the earnings below what reasonable rates would produce as to destroy the property of the carrier, or appropriate it to the benefit of the public. The cost of the service in carrying any one particular shipment may be difficult to determine, but the cost to the carrier of receiving, transporting, and delivering the whole volume of tonnage and number of passengers in a given period of time must include, as one of its substantial elements, interest on the value of the property used in the service. In countries conditioned as Texas has been and is, such a railroad property and business cannot be reproduced, except substantially in the same manner in which this has been produced; that is, by a judicious selection of location, by small beginnings, and gradual advance through a number of years, more or less, of unproductive growth. The particular location of this road, of course, cannot be reproduced, and it cannot be appropriated by another private or quasi public corporation carrier by the exercise of the state's power of eminent domain. And, even if the state should proceed to expropriate this property for the purpose of taking the same to itself for public use, the location of this road cannot be appropriated, any more than any other property right of a natural person or of a corporation can be appropriated, without just compensation. It is therefore not only impracticable, but impossible, to reproduce this road, in any just sense, or according to any fair definition of those terms. And a system of rates and charges that looks to a valuation fixed on so narrow a basis as that shown to have been adopted by the commission, and so fixed as to return only a fair profit upon that valuation, and which permits no account for betterments made necessary by the growth of trade, seems to me to come clearly within the provision of the fourteenth amendment to the constitution of the United

States, which forbids that a state shall deprive any person of property without due process of law, or deny any person within its jurisdiction the equal protection of the laws. It is true that railroad property may be so improvidently located, or so improvidently constructed and operated, that reasonable rates for carriage of freights and passengers will not produce any profit on the investment. It is also true that many railroads not improvidently located, and not improvidently constructed, and not improvidently operated may not be able, while charging reasonable rates for carriage of freight, to earn even the necessary running expenses, including necessary repairs and replacements. And there are others, or may be others, thus constructed and conducted, which, while able to earn operating expenses, are not able to earn any appreciable amount of interest or dividends for a considerable time after the opening of their roads for business. This is true now of some of the roads, parties to these bills. At one time or another, and for longer or shorter times, it has been true, doubtless, of each of the roads that are parties to these bills. Promoters and proprietors of roads have looked to the future, as they had a right to do, and as they were induced to do by the solicitation of the various communities through which they run, and by various encouragements offered by the state. The commission, in estimating the value of these roads, say that they included interest on the money invested during the period of construction. This is somewhat vague, but the "period of construction" mentioned is probably limited to the time when each section of the road was opened to the public for business. And even if extended to the time when the road was completed to Denison and to Austin in 1873, nearly 20 years after its construction was begun at Houston, it would not cover all of the time, and possibly not nearly all of the time, in which the railroad company and its predecessors have lost interest on the investment. The estimate made on behalf of the railroad in this case of the cost to that company and to its predecessor company of the railroad property, and the business of that company as it exists to-day, may not be exactly accurate,—clearly is not exactly accurate; but it seems to me that it is not beyond the fair value of the property, as it is shown to have been built up and constituted, and to exist to-day as a going business concern, and that such rates of fare for the carriage of persons and property as are reasonable, considered with reference to the cost of the carriage and the value of the carriage to the one for whom the service is rendered, cannot be reduced by the force of state law to such a scale as would appropriate the value of this property in any measure to the use of the public without just compensation to the owners thereof, and would deprive the owners thereof of the equal protection of the law guaranteed by the constitution of the United States, as cited.

It seems to be contended that the case of the Houston & Texas Central Railroad Company fully justifies the action of the commission in its imposition of a system of rates, because, as it is urged, it has made earnings over and above operating expenses sufficient to pay the interest on its outstanding bonds, and has a small surplus of a few thousand dollars in excess, as shown by its return to the commission of the operations of the year ending the 30th of June, 1898; in other words, it has

paid interest on \$34,000 of bonds to the mile. The return referred to is made on forms submitted by the commission, and under the item of "operating expenses" only ordinary repairs and replacements are allowed. In case an insufficient wooden bridge is replaced by an adequate iron bridge, that is treated as a betterment, and not permitted to figure in the returns as a part of the operating expenses. The bill and cross bill show that, if such betterments, which can only be made or procured out of the earnings of the road, were allowed in the return of operating expenses, the revenue earned and rendered as net revenue would not have been equal, by several hundred thousand dollars, to the interest on the bonded indebtedness; that the bonded indebtedness outstanding against this road being in excess of the value fixed by the commission, to the extent of more than 50 per cent., the company has no means of providing for such betterments, if not at all allowed to charge them at any time against the gross earnings of the road. More than this, it is shown that the road has never at any time paid any dividend upon its stock. On the whole case, as made in the case of the Houston & Texas Central Railroad Company, it seems clear to me that the system of rates adopted and enforced by the commission does not afford to the owners of this property the equal protection of the law, and takes from the owners and stockholders the property they have therein, without just compensation, and that, therefore, the rates must be held to be unreasonably low, unjust, and confiscatory, and should not be submitted to, and cannot be suffered to be enforced. As already said, the case made for relief in each of the other suits seems to be stronger than the case of the Houston & Texas Central Railroad Company; and the evidence appears to me to show clearly that the system of rates imposed is, as to each of the roads, unreasonably low, unjust, and confiscatory. Therefore the prayer of the bill in each case is granted, to the extent of enjoining the roads from adopting the rates heretofore promulgated by the commission, and enjoining the commission and the attorney general from enforcing the same, and enjoining all persons claiming thereunder from prosecuting the railroads, or any of the officers thereof, for the nonobservance of the system of rates heretofore promulgated by the commission.

BRYAR et al. v. CAMPBELL.

(Circuit Court of Appeals, Third Circuit. December 5, 1898.)

ABATEMENT—DISMISSAL FOR ABANDONMENT—JUDGMENT IN SECOND ACTION.

Pending an appeal in a suit in equity to enforce a conveyance of lands, the commencement by the plaintiff of an action of ejectment against the defendant to recover the same lands, and the rendition of a verdict and judgment therein adverse to the plaintiff, may properly be treated by the appellate court as an abandonment of the equity suit, or as a conclusive adjudication against the plaintiff of the facts on which the case rests, either of which will justify a dismissal of the bill.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

This was a suit in equity.

L. E. Barton and Edward Campbell, for appellants.

Wm. B. Rodgers, for appellee.

Before DALLAS, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

BUTLER, District Judge. In January, 1877, James Bryar was declared a bankrupt; and soon thereafter certain land to which he had title was offered for sale by his assignee. His wife, Jane Bryar, thereupon petitioned the district court for an order to restrain the sale, averring that the property was hers; the deed for the same having been made to her husband by mistake. While the application was pending the assignee sold the land to Campbell. Subsequently (June 29, 1878) Campbell was brought in as a defendant; and later (June, 1879) the petition was amended by inserting a prayer for conveyance of the land by Campbell to the petitioner. Thus the proceeding became substantially a suit between Mrs. Bryar and Campbell, for the property in controversy. Subsequently the court adjudged it to her, and decreed that Campbell convey accordingly. July 16, 1879, the latter appealed to the circuit court. While the appeal was pending the land was sold under a mortgage executed by James Bryar October 2, 1874, and purchased by William Rogers, who conveyed to Campbell. In 1880 Mrs. Bryar brought an action of ejectment against Campbell; and on the trial a verdict was rendered against her, and judgment entered accordingly. January 28, 1896, the plaintiff moved the court to dismiss the appeal (for imperfection) which motion the court refused. With these facts appearing on the record the appeal came to hearing in 1897, and the bill was dismissed. 78 Fed. 657. The refusal to strike off the appeal, and the dismissal of the bill, constitute the errors assigned.

The case is extraordinary; but in any view that can be taken of it, the action of the circuit court (in both respects complained of) must be affirmed. Granting that the district court had jurisdiction to enter the decree (which may well be doubted, to say the least) and that the circuit court had authority to do more than reverse, and dismiss the bill, for want of such jurisdiction, its refusal of the motion, and dismissal of the bill on the merits, must be affirmed; because, first, the suit at law must be treated as an abandonment of the proceeding in equity, and second (if not) the verdict of the jury must be regarded as a conclusive finding of the facts, on which the plaintiff's case rests, against her.

The decree is therefore affirmed.

LONDON & SAN FRANCISCO BANK, Limited, v. CITY OF OAKLAND et al.
(Circuit Court of Appeals, Ninth Circuit. October 3, 1898.)

No. 444.

1. DEDICATION OF STREETS—FILING OF PLAT.

A map or plat of a town signed and acknowledged by the owners of the land, and duly filed and recorded, and by reference to which such owners partitioned the property by deeds between themselves, constitutes

a dedication to the public of the streets shown thereon; and it is immaterial by whom or for what purpose the map was originally made.

2. **SAME—EVIDENCE OF INTENTION.**

An intention to dedicate, while it must be clearly shown, need not be proven by direct and positive testimony, but is to be determined upon the peculiar facts and circumstances of the particular case, and may be inferred therefrom. It is more readily inferred in the case of a street in a town or city than a country road.

3. **SAME—ACCEPTANCE OF DEDICATION—ACTION OF MUNICIPAL AUTHORITIES.**

A municipal ordinance declaring certain named streets as shown on a designated plat to be public streets, and ordering them opened as such, constitutes an acceptance of the dedication of such streets by the plat.

4. **SAME—ACCEPTANCE BY USER OF PORTION OF STREET.**

User by the public of a portion of a street dedicated as such by the owner of the land is an acceptance of the dedication as to the entire street, to be used when occasion requires.

5. **SAME—EFFECT OF NONUSER.**

Nonuser for 40 years of a portion of a street dedicated as such by the owners, and accepted by the municipal authorities, the other portion having been used during all that time, does not divest the public of the right to open and use the nonused portion whenever the exigencies of travel require it.

6. **SAME—ADVERSE POSSESSION OF STREET—MAKING OF IMPROVEMENTS.**

Where the rule prevails, as in California, that the right to obstruct a street dedicated to, and accepted for, public use cannot be acquired by adverse possession, such a dedication and acceptance are irrevocable; and neither length of possession taken thereafter, nor the making of valuable improvements thereon by the dedicator or others claiming through him, is any defense to the opening and use of such street by the public.

7. **SAME—INACCURACY OF MAP.**

The fact that a map by which streets were dedicated to public use is inaccurate in its delineation of lands lying outside of the streets and blocks shown thereon does not affect its efficacy as a dedication of the streets thereon designated.

8. **SAME—WIDTH OF STREET.**

The fact that a map of a town by which a street was dedicated shows the line of a marsh, which was the boundary of the tract platted, to be at one point within a less distance from the adjoining block than the width of the street through the remainder of its length, does not invalidate the dedication of the street to its full width, where in fact the line of the marsh was at a greater distance.

Appeal from the Circuit Court of the United States for the Northern District of California.

For opinion of circuit court, see 86 Fed. 30.

Suit in equity to quiet title to certain lands, and to enjoin the city of Oakland (which claims that the land in question has been dedicated as a public street known as "Fallon Street") from interfering with the same.

The suit was tried upon the following stipulation as to the facts:

"It is hereby stipulated in the above-entitled action that the following facts are admitted to be true, and proof of the same is hereby waived: That complainant was incorporated as averred in its bill; that the map mentioned in respondents' answer was filed and recorded by the persons from whom complainant derails title, and who were the owners in common of a tract of land embracing the land in controversy and the other lands shown on said map, on September 2, 1853, and that the copy attached to the answer, and marked 'Exhibit A,' is a full, true, and correct copy of said map; that the

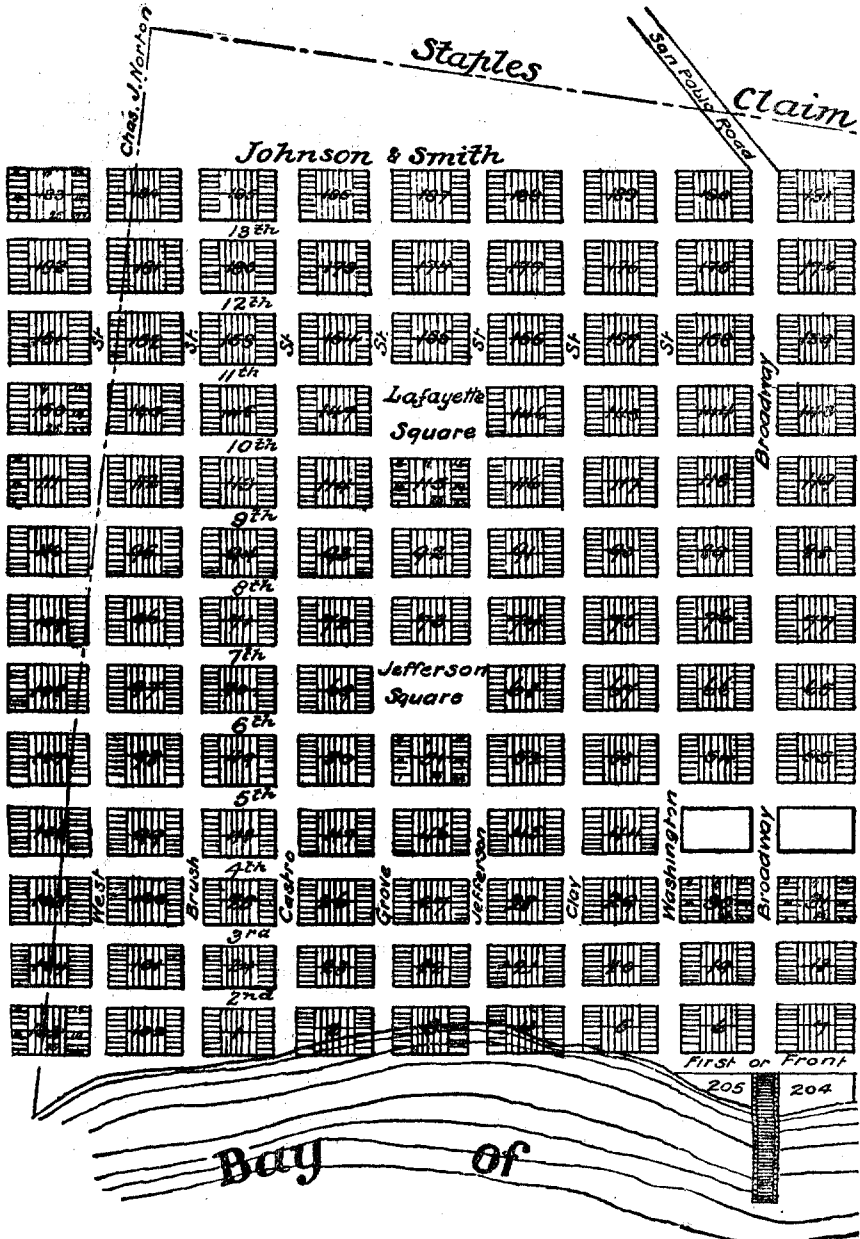
Rancho De San Antonio was granted by the Spanish governor of California, in 1820, to one Luis Peralta, who divided it among his sons, to one of whom (Vicente Peralta) he allotted the land bounded on the west by the Bay of San Francisco, on the south and east by the Estuary of San Antonio (designated on the Kellersberger map as 'Bay of Contra Costa' and 'Bayou'), and on the north by line extending from the Bay of San Francisco to said estuary, and lying north of the most northern tier of blocks shown on said Kellersberger map; that the claim of Vicente Peralta to said land was confirmed in 1854 by the board of commissioners appointed by act of congress to inquire into California land grants of Spanish or Mexican origin, and, on appeal to the United States district court, said confirmation was affirmed, in 1855, and the supreme court of the United States, in *U. S. v. Peralta*, 19 How. 343, affirmed said decision, and patent accordingly has issued from the United States conveying and confirming said lands to the successors in interest of Vicente Peralta; that, at the date of filing said Kellersberger map, the owners signing the same (who had succeeded to all the rights of Vicente Peralta in all said lands so allotted to him) owned a tract of land embracing all the lands laid off in blocks by the Kellersberger map, and all the lands surrounding the portion so subdivided into blocks, and extending therefrom to said exterior boundaries of the Vicente Peralta allotment; that said exterior strip or margin was not partitioned by said partition deed, but remained in undivided and common ownership for upward of ten years thereafter, unless the court shall hold that the premises in controversy were dedicated by said map to the public as a portion of Fallon street; that said map was made by said owners for the purpose of a partition and allotment of the blocks thereon laid down amongst themselves, and on the said 15th day of August, 1853, simultaneously with the filing of said map for record, said owners made partition of said blocks, allotting the same amongst themselves by the numbers and designations of the various blocks thereof as laid down, numbered, and designated upon said map, and executed amongst themselves reciprocally a deed of partition, whereby block 166 (but not the lands in controversy) was allotted and conveyed in severalty to John C. Hays and John Caperton, two of said owners; and the title of the complainant in this suit to the land in controversy is derived from said tenants in common by conveyances executed by them subsequently to said partition deed; the title to said block 166 is vested in other persons, not parties to this action, who hold the same under conveyances executed by said Hays and Caperton; that, after said partition was made, the respective parties thereto sold and conveyed the lands in their respective allotments to various persons, and from time to time, describing the parcels in the conveyances executed by them by the numbers and description thereof as shown upon said map, and referring to said map by its title of 'Kellersberger's Map of Oakland' for particularity of description; that about the year 1855, and at all times since, the land in controversy in this action was and is inclosed by substantial fence, and since 1858 it has been occupied as a residence; that the land claimed by respondents' answer to be a portion of Fallon street adjacent to complainant's property has never been actually opened or used as a street; but that other portions of Fallon street, to wit, from Sixth street to Eighth street, inclusive, have been for many years so opened and used by the public under the dedication made by the deed of partition and the said map; that the premises are now improved as stated in complainant's complaint, and are of the value therein stated; that the board of trustees of the town of Oakland, on the 27th day of August, 1853, passed and adopted an ordinance, of which a copy is hereto annexed, marked 'Exhibit B'; that the streets running north and south as laid down on said map, including Fallon street, are 80 feet wide; but the complainant does not admit the respondents' contention that by the facts hereinbefore set forth, or by any other facts, Fallon street extends further north than Tenth street. It is further stipulated that evidence may be introduced at the trial by either party as to matters not covered by the facts hereinbefore recited, and that such evidence may be taken orally instead of by deposition."

The following is the map referred to as "Exhibit A":

A COMPLETE MAP

RESPECTFULLY DEDICATED TO

By J. Kellersberger,



OF OAKLAND.

THE CITIZENS OF OAKLAND,
Surveyor.

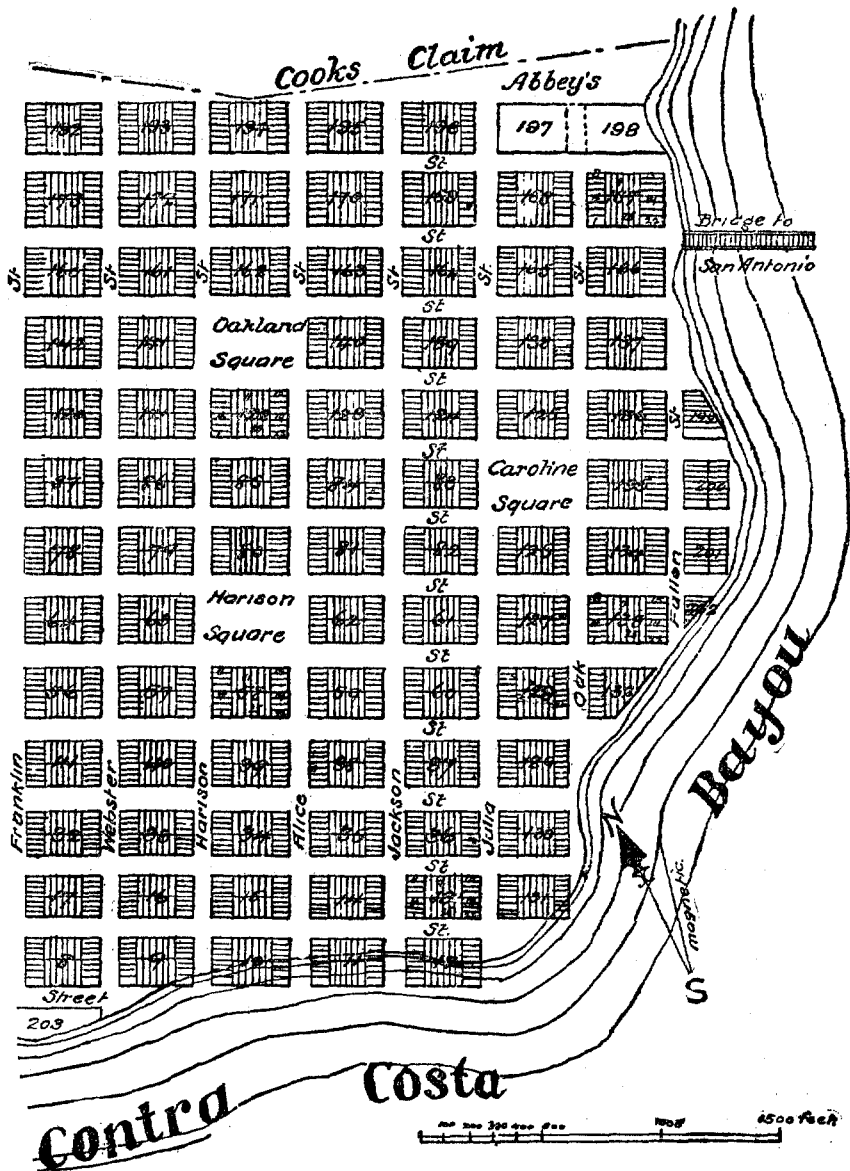


Exhibit B reads as follows:**"An Ordinance Declaring the Streets in the Town of Oakland Public Highways.**

"The board of trustees of the town of Oakland do ordain and resolve as follows:

"Section 1. The following streets in the town of Oakland as laid down and described on Kellersberger's map of Oakland are hereby declared public streets and highways, to wit: West street, Brush street, Castro street, Grove street, Jefferson street, Clay street, Washington street, Broadway, Franklin street, Webster street, Harrison street, Alice street, Jackson street, Julia street, and Oak street; said streets are 80 feet wide, except Broadway, which is one hundred and ten feet wide, and all run in direct line from high-water mark to a line two hundred feet north of the northern line of 13th street. Also the following named and described streets: Second street, Third street, Fourth street, Fifth street, Sixth street, Seventh street, Eighth street, Ninth street, Tenth street, Eleventh street, Twelfth street, and Thirteenth street, all of which said streets are eighty feet wide, and extend from high-tide line of the San Antonio creek to a line two hundred feet westerly from the western line of West street. Also so much of First or Front street, and so much of Fallon street, as are above high-water mark.

"Sec. 2. It shall not be lawful for any person to fence across said streets, or to erect buildings therein, or in any way to obstruct the free passage of said streets, or of any one of them. Any violation of this ordinance shall be punished by fine of not less than forty dollars nor more than one hundred dollars.

"Sec. 3. It shall be the duty of the marshal to remove any and all obstructions placed in the streets contrary to the provisions of this ordinance, and for this purpose he may proceed without warrant or process to remove the same.

"Passed August 27, 1853.

"[Signed]

A. W. Barrell, President of Board of Trustees.

"[Signed]

A. S. Hurlbutt, Clerk of the Board of Trustees."

Page, McCutchen & Eells, for appellant.

W. A. Dow, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity to enjoin the city of Oakland and its officers from entering upon land claimed by complainant, and interfering with its possession thereof, or from removing therefrom any of the buildings, fences, trees, or shrubbery thereon, and from using, or attempting to use, the same as a public street; and to quiet the title of complainant to the land. The defendants claim in their answer that the land in question has been dedicated as a public street, known as "Fallon Street," of the city of Oakland. Some testimony was given at the trial in addition to the facts stipulated by counsel. The controlling questions for our decision are (1) whether the lands specifically described in the bill were dedicated to public use as a street by Kellersberger's map; and (2) if dedicated, whether such dedication was accepted by the city before any revocation of the dedication.

1. The general principles applicable to this case are clearly enunciated in 5 Am. & Eng. Enc. Law, 400, as follows:

"The question whether land has been dedicated to public use is one of intent. No particular form is necessary to make a dedication. A grant is not

required. It may be made by parol, and proved by parol. All that is necessary is the assent of the owner, and the fact that it has been used by the public. The intention to dedicate is absolutely essential, and it should clearly and satisfactorily appear. *Animus dedicandi* is the vital principle; and time, though often material, is not an essential ingredient. It is not essential that the legal title should pass out of the owner, nor that there should be any grant of the use or easement to take the fee; nor is a deed or writing necessary to constitute a valid dedication; nor is any specific length of possession required. As against the original owner, the intent to dedicate must be made clear; and this intention is to be gathered from acts and declarations explanatory thereof, in connection with all the circumstances which surround and throw light upon the subject in each particular case." *City of San Francisco v. Canavan*, 42 Cal. 541, 554; *Quinn v. Anderson*, 70 Cal. 454, 456, 11 Pac. 746; *Cerf v. Pfleging*, 94 Cal. 131, 134, 29 Pac. 417; *Demartini v. City and County of San Francisco*, 107 Cal. 402, 409, 40 Pac. 496; *Buntin v. City of Danville*, 93 Va. 200, 204, 24 S. E. 830.

Applying these principles to the particular facts, circumstances, and conditions of the present case, we are of opinion that the dedication of Fallon street to the public is clearly shown. The suggestion that the Kellersberger map does not indicate an unequivocal intention of dedication, because it was not drawn up or prepared by the parties, is, in connection with the circumstances disclosed by the evidence, without merit. It appears upon the face of the map, on the margin of the plot showing the blocks and streets, that:

"This is the map of the plot of the town of Oakland, as surveyed by the squatters referred to in the deed of partition between Joseph K. Irving, of the first, John C. Hays & John Caperton, of the second, part, and Anna R. Poole, Joseph S. Lyons & Catherine S., his wife, & Alexander A. Young & Serena S., his wife, bearing date August 15th, 1853."

The partitioners signed the same by their attorney in fact, and he acknowledged the same before a proper officer. The map was duly filed and recorded. The deeds of partition made express reference to it. It has always been considered and treated as the official map of Oakland. The blocks are numbered, and the streets are named. What more is required? What difference does it make, under such circumstances, whether the map was made by the squatters, or by the partitioners, or for what purpose it was originally made? The partitioners adopted it, and they and all parties claiming under them should be held and bound by it. They referred to it and made it a part of their deeds of partition.

In *People v. Blake*, 60 Cal. 497, 505, *McKee, J.*, speaking with reference to this map, said:

"Now, when the original owners of the land made the Kellersberger map, or, which is equivalent to the same thing, adopted and had recorded the map made by the original squatters, they thereby dedicated to the public use all the streets and public squares to the extent as designated on the map."

The cases relied upon by appellant are not applicable to the evidence in this case. In *People v. Reed*, 81 Cal. 70, 22 Pac. 474, the map relied upon to show a dedication was never recorded. No purchaser had ever seen the map, and the case rested upon the map alone. The facts in *Phillips v. Day*, 82 Cal. 24, 22 Pac. 976, and *Cerf v. Pfleging*, 94 Cal. 131, 29 Pac. 417, were substantially the same. In *City of Eureka v. Fay*, 107 Cal. 166, 40 Pac. 235, the party sought to be bound had nothing to do with the map, and had expressly re-

fused to be bound by it, and had, in fact, prevented the map from being placed on record.

Appellant claims that the map upon its face fails to show that any part of Fallon street north of Tenth street was dedicated to the public because the letters "St." on all the other dedicated streets appear on the map on a line between Eleventh street and Twelfth street, whereas on Fallon street the letters "St." are placed on a line between Ninth and Tenth streets; and that, inasmuch as there was an open space on the line between Eleventh and Twelfth streets where the letters could have been placed, it must be taken as clear evidence that it was not the intention to dedicate that strip of land as a street. And in this connection it is argued by counsel that no dedication is clearly shown, because the portion of Fallon street upon which appellant's buildings were erected and improvements made was not used as a street; and the principle is sought to be invoked that where an owner plainly marks out a street for several blocks, and does not mark it out any further, he should not be held to have given the right any further than he has marked it. We are unable to agree with these views. On the other hand, we understand the law to be well settled that where a person makes or adopts a plot, and records it, and there is any space upon it that does not constitute any part of the platted blocks, he necessarily dedicates such space to a public use. In the present case the map shows the vacant ground, and all the circumstances tend clearly to show the intent that Fallon street should be extended when the necessities or exigencies of the situation required it.

As to the necessity of the continuation of this street, the circuit court said:

"An examination of the map itself shows the necessity of an unobstructed highway to Twelfth street. Almost at the junction of Fallon and Twelfth streets, assuming that Fallon street were fully opened up, is the Twelfth Street Bridge, which affords the means of crossing the 'Bayou,' so called, at that time. This bridge was in existence in 1853, when the partition of the land was made and the Kellersberger map filed for record. Opening up Fallon street between Eleventh and Twelfth streets, thereby passing over the land in dispute, would give the public traveling up (northward) on Fallon street a direct access to this bridge; otherwise, it would be necessary to go up Oak street, one block further away." 86 Fed. 30, 34.

When it is said that the intention to dedicate must be clearly proven, it is not meant that the testimony must be direct and positive upon this point, and that no inference of facts can be drawn therefrom. Every case depends upon its own peculiar facts and circumstances, and must, of course, be determined upon its own conditions and surroundings. The situation of the strip of land in connection with the contiguous blocks as plotted out upon the map, the conduct of the parties at the time the map was made or adopted, the recording of it, and acting upon it, and references made by the owners of the land in their deeds of partition, are all to be weighed and considered, and the court has the undoubted right to draw such inferences therefrom as the established facts may warrant. This is fully shown and clearly stated in *Quinn v. Anderson*, supra:

"Dedication is never to be presumed without evidence of an unequivocal intention on the part of the owner. * * * This intention may be inferred,

however, by any acts on his part which satisfy the mind of the existence of the intent, and the character of the acts requisite will depend very much upon the situation of the land over which the way is claimed, its surroundings, uses, and a variety of other circumstances tending to illustrate the intent. * * * Stronger evidence is required of the dedication of a neighborhood or timber road than of a thoroughfare (*Onstott v. Murray*, 22 Iowa, 457); and in case of a country road than of a street in a town or city (*Harding v. Jasper*, 14 Cal. 649)."

In *Rowan v. Town of Portland*, 8 B. Mon. 232, 246, the court, in discussing the fact of the absence of any written words on the slip between the street and the river, which it was claimed indicated that it was not dedicated to the public use, among many other things applicable to this case, said:

"We do not understand any of the cases as requiring that words shall be upon the map or plan of a town, expressing the objects and purposes of the different spaces and divisions appearing on its face. * * * When, from the position and relations of any open space in the town, it is apparent that it was intended to be public property, or for the public use, the dedication of such space to the public is as perfect as if the name or purpose were indicated by a written word."

In *Hanson v. Eastman*, 21 Minn. 509, speaking of the map, which it held clearly showed a dedication of First street across the vacant space, as well as within the lines marked on the map, the court said:

"The facts that this part of the triangular tract is left open, that it appears as a continuation of First street, that it affords the only street access to lots 7 and 8, block 116, leave no room for reasonable doubt that the intention expressed on the plat is to designate and dedicate the same as a public street."

In *Warden v. Blakley*, 32 Wis. 690, which in its facts, so far as the map is concerned, bears a close resemblance to the facts of this case, the court said:

"We think it perfectly clear upon the face of the plat itself, offered in evidence, that Alice street extends along the south side of block 20, and consequently that the locus in quo is a part of one of the public streets of the village of Darlington. The argument of the counsel for the respondent in support of this construction of the plat is unanswerable. The subdivision of the lots in block 20 shows that it was the intention of the original proprietor that Alice street should extend south of that block. But it is objected on the other side that, if this was the intention of the proprietor, he would have designated Alice street by a line south of block 20, as was done in reference to other streets upon the plat. But the circumstance that there is no line there defining the boundary of that street can have no such controlling effect as the counsel for the plaintiffs is disposed to give it; for there is no line west of block 21, defining Main street, and yet it is not seriously claimed that it does not extend there. Indeed, upon an examination of the plat itself, it seems impossible to arrive at any other conclusion than that it was the intention of the original proprietor to have Alice street extend across Main street, and along the south side of block 20."

Substantially all of the decided cases, whether based upon strict or liberal views, as to what constitutes a dedication, show, beyond controversy, that the facts stipulated and proven in the present case are sufficient to clearly establish the dedication of Fallon street to the public. *City of Cincinnati v. White*, 6 Pet. 431, 438; *Mayor, etc., of New Orleans v. U. S.*, 10 Pet. 662; *Morgan v. Railroad Co.*, 96 U. S. 716, 723; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 684, 3 Sup. Ct. 445, and 4 Sup. Ct. 15; *Kit-*

tle v. Pfeiffer, 22 Cal. 484, 489; Stone v. Brooks, 35 Cal. 489, 501; San Leandro v. Le Breton, 72 Cal. 170, 175, 13 Pac. 405; City of Eureka v. Armstrong, 83 Cal. 623, 22 Pac. 928, and 23 Pac. 1085; People v. Hibernia Savings & Loan Soc., 84 Cal. 634, 24 Pac. 295; Archer v. Salinas City, 93 Cal. 43, 51, 28 Pac. 839; Ham v. Council (Ala.) 14 South. 9; Hurley v. Boom Co., 34 Minn. 143, 24 N. W. 917; Great Northern Ry. Co. v. City of St. Paul, 61 Minn. 1, 7, 63 N. W. 96; Beasley v. Council (N. J. Sup.) 35 Atl. 797; City of Indianapolis v. Kingsbury, 101 Ind. 200, 210; Rhodes v. Town of Brightwood, 145 Ind. 21, 24, 43 N. E. 942; Town of Woodruff Place v. Raschig (Ind. Sup.) 46 N. E. 990, 993; Cook v. Harris, 61 N. Y. 448, 454; Flack v. Village of Green Island, 122 N. Y. 107, 114, 25 N. E. 267; Smith v. City of Buffalo, 90 Hun, 118, 124, 35 N. Y. Supp. 635; Mayor, etc., v. Frick, 82 Md. 77, 83, 33 Atl. 435; Winter v. Payne, 33 Fla. 470, 471, 15 South. 211; Porter v. Carpenter (Fla.) 21 South. 788; Evans v. Blankenship (Ariz.) 39 Pac. 812; Elliott, Roads & S. 111; 2 Dill Mun. Corp. (4th Ed.) §§ 635, 636, 640.

2. The question as to the acceptance of the dedication is equally clear. The adoption of the ordinance on August 27, 1853, set forth in the stipulation, including so much of Fallon street as was above high-water mark, constitutes an acceptance by the city. The map was made prior to August 3, 1853. The deed of partition which made express reference to this map was filed for record August 15, 1853. The map was filed for record September 2, 1853. When the map was filed for record, the acceptance became complete, and the dedication theretofore made, under the principles announced in several of the authorities heretofore cited, became irrevocable. Moreover, the acceptance by user of that part of Fallon street from Sixth to Tenth street was an acceptance of the whole of Fallon street to Thirteenth street, to be thereafter used when occasion or necessity required it.

In Taraldson v. Town of Lime Springs (Iowa) 60 N. W. 658, there was a vacant strip of land, not marked by any name, about 20 feet wide, on which the lots marked on the map abutted, and which the town of Lime Springs claimed as an alley. The town was incorporated in 1869. The plaintiff had owned certain lots since 1877. At the time of the incorporation, the strip of land in controversy and the adjoining lots were inclosed together, and remained in that condition until 1892, when there was an attempt to open the strip as a public alley, and proceedings were then instituted to prevent it. The court, upon this point, said:

"It is also claimed that, even though there was a dedication of the alley by the recording of the plat, there is nothing to show an acceptance on the part of the public. The evidence shows that for some years the alley was used to some extent, as much as it naturally would be with the then settlement of the town. There was at that time, and has since been, but little, if any, use for the alley; but we are not to forget that there are prospective as well as present considerations in such enterprises. The record shows that this alley had for a time such recognition by the public as is general in such cases, considering the surroundings. The necessity for its use then was slight, and hence the evidence of acceptance slight, but it was sufficient. There should be reasonable presumptions in favor of the preservation of such public interests, and the acts to constitute an acceptance on the part

of the public 'need be such only as the public wants demanded.' *City of Waterloo v. Union Mill Co.*, 72 Iowa, 437, 34 N. W. 197."

In *Town of Derby v. Alling*, 40 Conn. 410, 432, the court said:

"The first point made by the respondents is, that, in legal construction, the operation of the deed is confined to Third street as then actually used and traveled, and does not extend to the whole of Third street as delineated on the map. On this point, we think, the respondents are clearly wrong. The map is expressly referred to in the deed, and by reference is made part of it. We think, therefore, that the deed must be construed as embracing all the land which is included within the limits of the street as delineated on the map. * * * Where * * * a paper city is laid out as an entire thing, the dedication of all the streets to the public is entire; and, when the public act upon such dedication, the acceptance of part may, and in general will be, construed as an acceptance of the whole as an entirety. The public enter upon a part in the name of the whole, to enjoy the parts as from time to time such enjoyment of them becomes necessary. This is carrying into effect the manifest intent of the grantor, and of those for whose benefit the grant is made; and we see no difficulty in allowing this intent to prevail, and to call it a dedication in present to be carried into effect in futuro. * * * We feel no hesitation, therefore, in holding upon the facts appearing in the record, and upon the deed in connection with these facts, that Messrs. Phelps and Smith made an irrevocable dedication of the whole of Third street to the public for the use of the highway, not, however, to be necessarily opened and worked immediately, but to be opened whenever, within a reasonable time thereafter, the opening of it to its full extent should be required, and that the acceptance of the deed by the town, * * * of the portions of the street which were opened, is a constructive acceptance of the dedication of the entire street."

The fact that only a portion of Fallon street, as marked upon the map, was opened up and used, and that there was a nonuser of the other portion for a number of years, does not, under the well-settled principles of the decided cases upon this subject, divest or impair the right of the public to open up and use the remaining portion of the street dedicated and accepted as a public street whenever the exigencies of the public travel, and the wants and needs of the community, require it. *Barclay v. Howell*, 5 Pet. 498, 506; *Grogan v. Town of Hayward*, 4 Fed. 161, 164; *Coffin v. City of Portland*, 27 Fed. 412, 420; *Taraldson v. Town of Lime Springs (Iowa)* 60 N. W. 658; *Town of Lake View v. Lebahn (Ill. Sup.)* 9 N. E. 269, 272; *Heitz v. City of St. Louis*, 110 Mo. 618, 625, 19 S. W. 735; *Fliersheim v. City of Baltimore (Md.)* 36 Atl. 1098.

3. Under the laws of some of the states, the fact that appellant had been in the actual possession of the land for such a length of time as is shown in this case would have enabled it to recover upon the plea of adverse possession; but in California the law is well settled that no one can acquire by adverse possession, as against the public, the right to obstruct a street dedicated to public use, and thus prevent the use of it as a public highway. *Hoadley v. City and County of San Francisco*, 50 Cal. 265, 274; *People v. Pope*, 53 Cal. 437, 450; *City of Visalia v. Jacob*, 65 Cal. 434, 4 Pac. 433; *San Leandro v. Le Breton*, 72 Cal. 170, 177, 13 Pac. 405. Where this rule prevails, the authorities are all to the effect that when the land has been dedicated to, and accepted by, the public, it becomes irrevocable; and mere lapse of time, or the making of valuable improvements thereon, constitutes no defense whatever. *Buntin v. City of Dan-*

ville, 93 Va. 200, 208, 24 S. E. 830; *Ham v. Council*, supra; *Taraldson v. Town of Lime Springs*, supra; *Mayor, etc., v. Frick*, 82 Md. 77, 86, 33 Atl. 435; *Elliott, Roads & S.* 667, 670.

We do not understand appellant to claim that the statute of limitations can be pleaded as a defense. But the suggestion is made that the land in controversy was fenced by the owners in 1855, and that ever since 1858 it has been occupied as a private residence, and that this use, which is inconsistent with the theory of dedication, is in itself a revocation of the offer to dedicate. But this suggestion is shorn of all its strength by the unquestioned fact that the land was dedicated and accepted long prior to 1855, and before any use was made of the ground inconsistent with the theory of dedication. The facts are that the dedication and acceptance became complete in 1853, and the owners of the land could not thereafter revoke the dedication previously made.

The case of *People v. Reed*, 81 Cal. 70, 22 Pac. 474, hereinbefore referred to, is not in opposition to the views herein expressed. It is based upon an entirely different state of facts, and has no application to this case.

In *Wolfskill v. Los Angeles Co.*, 86 Cal. 405, 412, 24 Pac. 1094, 1096, the court, after quoting from the *Reed Case*, said:

"That case was decided in bank, and the principles there laid down, and here affirmed, furnish ample protection to this plaintiff, and to all others whose lands have been platted into streets, lots, and blocks, against any claims of the public to streets and highways of which the offer of dedication has not in some form been accepted by the public authorities. But in the *Reed Case*, as before stated, there was never an offer of dedication, for the reason that the map was never recorded. Some time after the map was made, the land in controversy in that case was actually inclosed, and substantial buildings erected thereon; and the same were occupied for more than twenty years before there was any attempt made to accept what was claimed to have been, by reason of the making of the map, an offer of dedication. The court held, not only that there had been no offer of dedication to be accepted, but also that even if the making of the map, without recording the same, and the sale of lots according to the same, had been an offer of dedication, there had been a withdrawal of the offer more than twenty years before the attempted acceptance. The facts of that case are so unlike those here developed that the case is not in point."

The same distinction is again referred to, at considerable length, in *Archer v. Salinas City*, 93 Cal. 54, 28 Pac. 839.

With reference to *People v. Reed* and some of the other California cases cited by appellant, we adopt, as applicable to the case in hand, the language of the court in *People v. Hibernia Savings & Loan Soc.*, supra:

"Quite a number of cases involving the dedication of streets and highways have recently been decided by this court. The facts in no two of them were exactly alike, and some of them were of difficult solution. But in none of these cases were any principles stated with which the conclusion of the court in the case at bar at all conflicts."

4. In arriving at the conclusions above stated, we have not overlooked the argument of counsel based upon the fact that appellant introduced in evidence the certificate of the city engineer to show that the east line of the Peralta patent, which, being a Spanish grant, is presumed to follow the line of high tide, is at no point less than 500

feet distant from the east line of block 166. This testimony, if admissible, might tend to show that the Kellersberger map does not correctly delineate the line of the marsh or ordinary high tide. We fail to see any substantial reason why such evidence should be allowed to destroy the force and efficacy shown by the adoption of the map, which, in our opinion, furnishes the only safe guide for the court to follow in the determination of the questions involved herein. If appellant owns the land for 500 feet east of the easterly line of Fallon street, that cuts no more figure in the case, with reference to the dedication, than the fact that appellant's grantors own the land northerly of the streets laid down on the map. The only dedication that was made was of the blocks and streets designated on the map. It shows a vacant space for Fallon street. We have nothing to do with any of the outside lands. The map shows the condition of affairs as they existed at the time the dedication was made; and, as the map was referred to in the deeds of the owners of the lands, no outside testimony of descriptions in patents for outside lands, not included upon the maps, should be allowed to change the dedication of streets as shown upon the map.

5. Finally, it is claimed that, in any view of the case, the judgment of the circuit court is erroneous, in this, to wit: That the scale of the Kellersberger map shows that the narrow strip of land on Fallon street north of Tenth street, as delineated on the map, is not over 40 or 50 feet wide, and the line of marsh, or high tide, is not, therefore, 80 feet distant from the north half of block 166, according to the scale of the map; and, as the city only claims a dedication to the marsh line, it has obtained a judgment for more than the evidence shows it is entitled to. With reference to this point, but little need be said. In the nature of the case, and from the character of the map, it should not be expected that the various thread lines intended to mark the marsh line would be as perfect as the lines of the street. The testimony of the city engineer, and of other witnesses who had been residents of Oakland for many years, shows that Fallon street opposite block 166 is over 80 feet wide,—about 88 or 90,—to the marsh line.

Upon the whole case, we are of opinion that the judgment of the circuit court is correct; and it is therefore affirmed, with costs.

DEXTER SAV. BANK v. FRIEND.

(Circuit Court, S. D. Ohio, W. D. November 26, 1898.)

No. 5,125.

1. CORPORATIONS—NEGOTIABLE PAPER—AUTHORITY OF OFFICER.

A negotiable note executed in the name of a corporation by an officer or agent having no authority to issue such paper in its behalf is void, but, if the officer or agent had authority to issue notes of the corporation for any purpose, such note is valid and enforceable against the corporation in the hands of a bona fide holder, though executed for an unauthorized purpose.

2. SAME—LIABILITY OF OFFICER FOR UNAUTHORIZED ACTS.

An officer of a corporation, who executes negotiable notes in the name of the corporation, is liable to a bona fide purchaser of the notes in an

action for damages for falsely representing his authority, where he had no authority to issue notes of the corporation for any purpose, and the notes are consequently void; but where he had authority to execute notes in the business of the corporation, although he abused his authority by executing them for an unauthorized purpose, he is not liable to the holder, as the notes are binding on the corporation, as represented, and his liability is to the corporation alone.

8. SAME—AUTHORITY OF PRESIDENT—PRESUMPTIONS.

In the absence of a statute or by-law limiting his authority, the president of a corporation, as its legal head, is presumed to be authorized to bind the corporation by his acts in its name, and notes so executed by him are presumptively valid against the corporation.

Hearing on motion, by agreement of parties treated as a demurrer to the petition.

R. D. Marshall, for plaintiff.

McMahan & McMahan, for defendant.

THOMPSON, District Judge. A motion was filed to the petition in this case to require the plaintiff (1) to separately state and number its causes of action; (2) to make its petition definite and certain by stating how and wherein it was damaged. Upon the hearing the case was submitted to the court upon the second assignment of the motion.

The petition shows: That in the year 1895 the defendant, J. H. Friend, was the president and treasurer of the Friend-Stebbins Manufacturing Company. That it was no part of the business of that company "to make, execute, or put in circulation promissory notes or obligations other than notes or obligations in its business transactions, and connected with the management of its business affairs; all of which the defendant, J. H. Friend, well knew." That the defendant, J. H. Friend, without right or authority, and for the accommodation of E. C. Hargrave & Co., executed and delivered to E. C. Hargrave & Co. two promissory notes, of which the following are copies:

"\$3,000.00

West Carrollton, O., Sept. 6th, 1895.

"Four months after date we promise to pay to the order of E. C. Hargrave & Co., three thousand dollars, at First Natl. Bank, Miamisburg, O. Value received.

Friend-Stebbins Mfg. Co.,

"No. 186. Due Jan. 6/9/96.

By J. H. Friend, Pt. & Treas."

"\$3,500.00

West Carrollton, O., Dec. 2nd, 1895.

"Four months after date we promise to pay to the order of E. C. Hargrave & Co., thirty-five hundred dollars, at First Natl. Bank, Miamisburg, O. Value received.

Friend-Stebbins Mfg. Co.,

"No. 218. Due April 2/5/96.

By J. H. Friend, Pt. & Treas."

—That said notes were not given on account of any business transaction of the Friend-Stebbins Manufacturing Company, nor did it receive any consideration therefor, but that they were given solely for the accommodation of E. C. Hargrave & Co. That the plaintiff purchased these notes before they became due in the regular course of business for a valuable consideration "without any knowledge of the manner or purposes" for which they were given, believing that they "were issued in a business transaction, and for the use and benefit of the said Friend-Stebbins Manufacturing Company." That said plaintiff paid for said notes \$6,368.

The second assignment of the motion is predicated upon the fact that the plaintiff is an innocent holder of the notes, and has a right of action thereon against the Friend-Stebbins Manufacturing Company to recover the amount of the moneys mentioned therein, and that, therefore, in this action, which is one to recover damages against the defendant, Friend, for falsely representing that he had authority to sign and put the notes in circulation, the plaintiff is only entitled to recover nominal damages, unless special damages be assigned and definitely set forth in the petition. This proposition concedes the right of the plaintiff to sue the Friend-Stebbins Manufacturing Company upon the notes to recover the amount thereof, and also to sue the defendant, Friend, for damages for falsely warranting that he had authority to sign and put the notes in circulation. I doubt if this position can be maintained. In my opinion, the plaintiff is either limited to an action against the Friend-Stebbins Manufacturing Company on the notes, or has an election either to sue that company upon the notes, or the defendant, Friend, for damages, and cannot pursue both remedies. If the plaintiff can recover its moneys, with interest, by an action on the notes against the company, it has no claim against the defendant, Friend; and, on the other hand, if the present action can be sustained, and the plaintiff is entitled to be made whole for the moneys expended by it in the purchase of these notes, then it has waived its right of action against the company.

The questions, therefore, for consideration upon this motion are: (1) Is the plaintiff limited to an action on the notes against the Friend-Stebbins Manufacturing Company? (2) Or has it an election between an action on the notes against the company and an action against the defendant for damages, for falsely warranting his authority to sign and put the notes in circulation? A distinction must be made between cases where there is an absolute want of authority on the part of the agent and cases where the agent has authority, but abuses it. Where the agent has authority, and where negotiable commercial paper is the subject of the transaction, an innocent holder of the paper gets just what he bargained for; but where the agent is without authority the holder gets nothing. Where the agent is without authority, according to some of the cases, the holder has an election to sue the agent on the paper, treating it as his contract, or to sue him for damages, for falsely warranting his authority to put the paper forth. But the great weight of authority is to the effect that the holder must resort to the latter remedy. The holder cannot look to the principal. *Taylor v. Nostrand*, 134 N. Y. 109, 31 N. E. 246; *Trust Co. v. Floyd*, 47 Ohio St. 525, 538-541, 26 N. E. 110; *White v. Madison*, 26 N. Y. 117, 123-125. And the holder, although but an indorsee of the paper, may maintain an action for damages against the agent if the representation of authority is untrue, even though the agent's motives were good, and no fraud in fact was intended. In such cases, the representation may be regarded as made to all to whom the paper may be offered in the course of circulation. *Polhill v. Walter*, 3 Barn. & Adol. 114, 123. But where the agent has authority to sign and put forth negotiable commercial paper in behalf of his principal, but abuses the authority given him, if, as in this case, Friend, as the president and treasurer of

the Friend-Stebbins Manufacturing Company, had authority to sign and put in circulation negotiable commercial paper in furtherance of and in the regular course of the business of the corporation, and, instead of doing that, abused the authority given him by putting forth the paper in question for the accommodation of a stranger, and the paper came into the hands of the plaintiff as an innocent holder, then the corporation is bound, and must pay the notes, and look to Friend for redress for the injury it has sustained. Here the holder has not been deceived or misled. It has got just what it expected to obtain, and can maintain an action against the corporation to compel the payment of the notes, and has no claim against Friend. The wrong involved in Friend's abuse of authority was committed against the corporation, and not against the holder of the paper. Friend, the agent, had authority to put forth business paper on behalf of the corporation, and, so far as the holder is concerned, this is the business paper of the corporation. It was intended that the holder should have a good title to the paper. It was necessary to protect the holder in order to accommodate Hargrave & Co. The representation, so far as the holder is concerned, was not untrue or false. But in view of the fact that the plaintiff got all it bargained for, and has sustained no injury, the representation, if false, is immaterial. *Bird v. Daggett*, 97 Mass. 494. Therefore, if there was no false representation to the plaintiff, and if plaintiff has a right of action on the notes against the corporation for the recovery of the amount of moneys for which they were given, it can have no right of action against Friend for damages, nominal or otherwise. It has no election, therefore, between an action on the notes against the company and an action against the defendant for damages for falsely warranting his authority to sign and put the notes in circulation, but is limited to an action on the notes against the company.

Upon the proposition that the innocent holder of such paper has a right of action upon it against the principal, I cite the following cases: *Bank of Genesee v. Patchin Bank*, 13 N. Y. 315, 19 N. Y. 312; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 129; *Olcott v. Railroad Co.*, 27 N. Y. 546; *Bank of New York v. Muskingum Branch Bank*, 29 N. Y. 619; *Mechanics' Banking Ass'n v. New York & S. White Lead Co.*, 35 N. Y. 505; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; 2 Beach, Priv. Corp. § 391. The cases cited by the plaintiff's counsel are consistent with these cases. And as to the authority of the president to act for the company, it has been held by the supreme court of Illinois, in accordance, I think, with the prevailing rule, that: "In the absence of legislative enactment, or provision made in the by-laws, corporations usually act through their president. He being the legal head of the body, when an act is performed by him the presumption will be indulged that the act is legally done, and is binding upon the body." It is alleged in the petition that Friend, as president and treasurer, was not authorized to sign the notes in question, but it is not alleged that he was not authorized to sign and put forth business

paper; on the contrary, the allegations of the petition, fairly construed, justify the inference that he had such authority.

Counsel having consented that the second assignment of the motion might be treated as a demurrer to the petition, it will be so treated, and sustained on the ground that the petition does not state facts sufficient to constitute a cause of action.

THOMAS ROBERTS STEVENSON CO. v. M^cFASSELL.

(Circuit Court of Appeals, Third Circuit. November 28, 1898.)

No. 36.

1. PATENTS—INVENTION—PRACTICAL SUCCESS OF DEVICE.

In a doubtful case, the fact that the patented device has gone into general use, and superseded other devices, may be sufficient to turn the scale, and support the presumption of patentability arising from the grant of the patent.

2. SAME—IMPROVEMENT IN RANGES AND STOVES.

The Hayes patent, No. 310,276, for an improvement in ranges and stoves, covers a true combination, and discloses patentable invention, and is valid.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Henry Everding and A. v. Briesen, for appellant.

Joshua Pusey, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

ACHESON, Circuit Judge. This suit was brought by the Thomas Roberts Stevenson Company against Harry W. McFassell, Jr., for the infringement of letters patent for an improvement in ranges and stoves, being No. 310,276, and dated January 6, 1885, granted to Isaac Hayes, and by him assigned to the complainant below, who is here the appellant. The specification of the patent thus sets forth the invention:

"My invention consists in constructing a portable cooking range in which the circulating boiler rests in a horizontal position upon a supporting frame secured to the top of the range, with circulating pipes connected to the boiler, and with the water-back in the fire chamber, the object of which is to dispense with brickwork, and thus lessen the cost, and to economize space, and render the parts easy of access in case of repairs or cleaning."

The nature of the patented improvement is well stated by Mr. Livermore, the complainant's expert, who testifies thus:

"The Hayes patent shows and describes a cooking and water-heating apparatus comprising a portable cooking range and a hot water circulating boiler, and a supporting frame for the circulating boiler, itself supported upon the body of the range, the said boiler being connected by circulating pipes with the water-back in the range. The said parts constitute a complete cooking and water-heating apparatus, all parts of which are structurally correlated to one another, so that they can be made up at the shop or factory as a complete apparatus, instead of, as in prior apparatus for this purpose, being made as separate manufactures requiring structural and machine work at the place of the erection of the apparatus for use."

The claim of the patent is in the words following:

"The combination of the portable range, A, uprights, C, C', plate, E, warming shelf, F, boiler, D, and pipes, B, B', substantially as shown and described."

This combination includes the range proper, the boiler supporting frames secured to the top of the range, the horizontal circulating boiler supported upon the frame, and the connecting pipes between the boiler and the water-back. These elements together constitute an article in complete form, ready to be set up for use at any desired place, the structural work and skilled labor required at the point of installation in the case of the previously used brick-set ranges being wholly dispensed with. The claim is not for a mere aggregation. The essence of a true combination is here found, namely, a co-operative union of elementary parts effecting one practical result. The calls for the "plate, E," and "warming shelf, F," may impose unnecessary limitations upon the patentee, but they do not vitiate the claim.

We do not find that this improvement was disclosed or suggested by any of the prior patents set up in defense. The Whiteley patent of 1863 is the most pertinent reference, but it falls far short of being anticipatory. It shows a brick-set range of very complicated construction, and the analogy between it and the Hayes structure is remote. Indeed, the Whiteley patent contains no hint of a cooking and water-heating apparatus, the elements of which are structurally combined so that the whole apparatus can be produced as an article of manufacture, ready for use wherever needed. The evidence satisfies us that the constituents of Hayes' claim were never previously combined in the manner stated in his patent. In fact his structure was new.

In respect to the utility of the Hayes improvement, the proofs are full and convincing. Not only does his construction dispense with all brickwork, so that the range of the patent can be set up for use as readily as a portable cooking stove, but the original cost of the article is greatly reduced. A saving of fuel is also effected, while an increased supply of hot water is secured. Kitchen space is economized. The parts are more easily accessible for purposes of repairs and cleaning than in the old form of construction. The advantages of the patented range are such that it has met with great public favor, and has largely displaced the old brick-set range.

Looking at the subject in the light of all the evidence, we are not able to concur in the conclusion of the circuit court that the Hayes construction did not involve any exercise of the inventive faculty. Upon the question of patentable novelty and usefulness, the proofs, we think, sustain the action of the patent office in allowing the patent. The presumption of patentability arising from the grant of the patent (*Lehnbeuter v. Holthaus*, 105 U. S. 94) has not been overthrown. Moreover, in a doubtful case the fact that the patented device has gone into general use, and superseded other devices, may be sufficient to turn the scale. *Smith v. Vulcanite Co.*, 93 U. S. 486. Upon the entire proofs it is our judgment that the Hayes patent is valid. That the defendant infringes the

claim is clearly shown. The decree of the circuit court is reversed, and the cause is remanded to that court with direction to enter a decree in favor of the complainant in the bill.

PHILADELPHIA & R. RY. CO. v. YOUNG.

(Circuit Court of Appeals, Third Circuit. December 5, 1898.)

1. TRIAL—WAIVER OF EXCEPTIONS.

An exception to the denial of a motion for nonsuit, made at the close of plaintiff's evidence, is waived by the subsequent introduction of evidence by defendant.

2. RAILROADS—ACTION FOR PERSONAL INJURY—SUFFICIENCY OF EVIDENCE.

The evidence showed that while plaintiff was rightfully on the platform of a station on defendant's railroad a large number of sparks escaped from the bottom of a passing engine, which were blown upon the platform, and one of which struck plaintiff's eye, destroying the sight. There was also evidence tending to show that the escape of sparks in that manner from an engine was not usual if the ash pan was in proper repair, and the engine properly handled. *Held*, that such evidence was sufficient to justify the submission of the question of defendant's negligence to the jury.

In Error to the Circuit Court of the United States for the District of New Jersey.

J. J. Bergen, for plaintiff in error.

Chauncey H. Beasley, for defendant in error.

Before **ACHESON** and **DALLAS**, Circuit Judges, and **BUTLER**, District Judge.

ACHESON, Circuit Judge. Charles Young brought this suit against the Philadelphia & Reading Railway Company to recover damages for the loss of the sight of his left eye, alleged to have been occasioned by the negligence of the railway company. It appears that on the forenoon of October 11, 1897, the plaintiff took passage on one of the defendant's trains on a trip from Trenton to Philadelphia. The train stopped at Wayne Junction station, where it was necessary for the plaintiff to change trains. The plaintiff got out on the defendant's platform at this station to take the train which was to convey him to his destination. The plaintiff testified that while he was thus on the platform, awaiting his train, a through train of the defendant passed along on one of the tracks near the platform at a high rate of speed; that the furnace door of the locomotive was open, and a man was shoveling coal into it; that he (the plaintiff) saw "a lot of sparks" falling from underneath the locomotive (where the ash pan was), "flying in all directions," "shooting all along the bottom there"; that the wind was blowing towards the station, and the redhot cinders flew towards him, and four or five of them struck his face and clothing, one of them striking right in his eye. He stated that the cinder that struck his eye "must have been a pretty good-sized one," because when he "wiped the eye the handkerchief was full of pieces of cinders"; that there were "small pieces of coal and blood on it." Notwithstanding medical treatment, obtained with rea-

sonable promptitude, the injury to the plaintiff's eye resulted in the total loss of its sight.

At the close of the plaintiff's evidence in chief the defendant's counsel moved the court for a judgment of nonsuit on the ground of alleged lack of proof of negligence. This motion was refused, and its denial is now assigned as error. But the defendant waived exception to this ruling by its subsequent introduction of evidence in defense. *Telegraph Co. v. Thorn*, 28 U. S. App. 123, 12 C. C. A. 104, and 64 Fed. 287; *Railroad Co. v. Mares*, 123 U. S. 710, 713, 8 Sup. Ct. 321. The defendant, however, after all the evidence was in, asked for peremptory instructions in its favor, which the court declined to give; and the assignment of error to this refusal presents the principal question in the case, namely, the sufficiency of evidence legitimately tending to show that the injury to the plaintiff's eye was caused by some negligence chargeable to the defendant.

The plaintiff was lawfully on the defendant's platform at Wayne Junction station. Indeed, as he was there for the purpose of making a change of trains, perhaps he might be regarded as having been, at the time of the accident, constructively in the defendant's care as a passenger. At any rate, the defendant owed to the plaintiff the duty of at least reasonable and ordinary protection against the peril of live cinders issuing from its locomotives running past the station in near proximity to the platform. We agree to the proposition that the defendant is not liable to the plaintiff for damages necessarily caused by the careful and skillful exercise of its lawful rights, and, undoubtedly, the burden was on the plaintiff to prove negligence on the part of the defendant occasioning the injury complained of. Negligence, however, may be established by circumstantial evidence, and proof of the occurrence of an accident which ordinarily would not have happened if due care had been exercised may justify an inference of negligence. This accident occurred in the daytime, yet, upon the plaintiff's account of the matter, the sparks were plainly visible. It is, then, a rational supposition that the sparks were of large size. Certainly this seems to have been the character of the live cinder which struck and destroyed the plaintiff's eye. Moreover, according to the plaintiff's testimony, the sparks fell from underneath the locomotive in great numbers. Now, the evidence warrants the belief that a properly constructed and carefully managed ash pan would have prevented such an emission of sparks, and, indeed, any considerable fall of sparks. Upon the theory of proper care and absence of fault, the accident here is unaccountable. One of the defendant's witnesses, a locomotive fireman, testified that if he saw a spark coming from the ash pan he "would think something must be wrong." Other witnesses gave testimony of the like import. The evidence as a whole, we think, was amply sufficient to carry the case to the jury. *Huyett v. Railroad Co.*, 23 Pa. St. 373; *Railroad Co. v. McKeen*, 90 Pa. St. 122. Although the defendant introduced testimony to show that the appliances upon its locomotive for preventing the emission of sparks were of the best known kind, and that they were in good order, and carefully handled, still, under the entire evidence, and in view of all the circumstances, the question of negligence was not one of law for the deter-

mination of the court, but was a question of fact to be submitted to the jury.

The parts of the court's charge embraced in the fourth and fifth assignments seem to us to be free from error. Those instructions on the whole were very favorable to the defendant. Under the charge there could be no verdict for the plaintiff unless the jury found the defendant to have been guilty of negligence. The judge said: "It must be shown that the defendants have been guilty of some negligence; that they have failed in some duty to this plaintiff,—either they have not used proper appliances, or, if they have used proper appliances, they have not used them with reasonable care." Several experienced witnesses had testified, in substance, that the emission of sparks would indicate that something was wrong with the ash pan, and the court was justified in submitting to the jury the question whether proper appliances had been used.

We do not perceive that any error was committed in allowing this question and answer: "Q. Is there any general custom, that you know of, with regard to firing or not firing an engine as it passes a railroad station? A. Well, it is generally the rule not to fire at stations." The witness had been a railroad engineer. He stated the reason for the general rule, namely, the danger of sparks flying from the smoke-stack and ash pan during the operation of firing. The evidence related to general usage, and bore on the question of the exercise by the defendant of ordinary care. The judgment of the circuit court is affirmed.

BERKEY v. CORNELL.

(Circuit Court, W. D. Virginia. April 14, 1898.)

1. ACTIONS—FEDERAL COURTS—JOINDER OF LEGAL AND EQUITABLE CLAIMS.

Legal and equitable causes of action cannot be joined in one suit in the courts of the United States.

2. SAME.

A declaration in assumpsit on the common counts in a federal court cannot also join a special count, which discloses a controversy between the plaintiff and defendant, requiring a construction of contracts, and the investigation, adjustment, and settlement of accounts growing out of the relations of the parties, either as partners in trade, principal and agent, or trustee and cestui que trust; such cause of action being of equitable cognizance.

On Demurrer to the Declaration for Misjoinder of Causes of Action.
Wallbridge & Belden, for plaintiff.
Sipe & Harris, for defendants.

PAUL, District Judge. This is an action of assumpsit brought by the plaintiff against O. H. P. Cornell and Eugene E. Barnard. Process was served on Cornell, but returned "Not found" as to Barnard. The defendant Cornell demurs to the declaration, on the ground that it embraces both legal and equitable demands. The declaration contains the usual common counts employed in that form of action, and they are not objectionable. The declaration also contains a special

count, in which the cause of action is stated, and which, it is alleged, constitutes an equitable demand. This special count is as follows:

"For that whereas heretofore, and on or about the 4th day of April, A. D. 1893, the plaintiff was the owner of an equal undivided one-half interest in a concession before then granted to him by the board of managers of the World's Columbian Exposition, held in the said city of Chicago, which concession was known as the 'Portable Chair Concession,' of which the plaintiff had theretofore sold the other equal undivided one-half interest to John S. Ford, of the city of Chicago, in the said state of Illinois. That on the said 4th day of April, A. D. 1893, the plaintiff, Julius Berkey, and the said John S. Ford, as parties of the first part, entered into a contract, at the said city of Chicago, with Oliver H. P. Cornell and Eugene E. Barnard, defendants herein, as parties of the second part, which contract provided in substance: (1) That Oliver H. P. Cornell should act as general manager for the parties of the first part, in the operation of said portable chair concession. (2) That the parties of the first part should furnish the chairs at cost; provide the necessary booths and office quarters, and sufficient money for the successful management of the business; that they should advance to the said Oliver H. P. Cornell one hundred dollars per week for his personal use, the same to be deducted from his share of the profits, and to be in lieu of any salary; and that they should also pay to the parties of the second part fifteen (15) per cent. of the net profits arising from the portable chair concession, and thirty-three and one-third (33 $\frac{1}{3}$) per cent. of the profits arising from the sale of certain merchandise, if made in connection with this concession. (3) That Oliver H. P. Cornell should devote his entire attention to the business during the exposition; that, if he was unable to carry out the provisions of the contract, the said Eugene E. Barnard should carry out and complete them; and, if both should fail to perform according to the true intent of the contract, then the parties of the first part might declare it void. (4) That the parties of the second part should employ and direct the labors of all employes according to the instructions of said first parties, the latter reserving the right to employ a second assistant manager. (5) That all the parties to this contract should be governed by a certain contract then in force between the said Julius Berkey and the said World's Columbian Exposition, a copy of which is hereto attached, marked 'Exhibit A,' and made a part of this declaration. (6) That the parties of the second part should furnish to the parties of the first part a sufficient bond, with sureties approved by the parties of the first part, in the penal sum of ten thousand dollars, as security for money advanced, to the manager as hereinbefore stated, and for the faithful performance of this contract. (7) That the parties of the first part should be reimbursed for all money advanced by them for the preparation or continuance of this business, and that they might withdraw out of the proceeds of the business up to and including twenty thousand dollars in excess of the amount necessary to reimburse them; and, if the profits of the business did not amount to the above-named sum, the parties of the second part should have their proportion thereof, as hereinbefore set forth. (8) That parties of the second part should give their duebills each month for the amount of money advanced to the manager during the previous month. (9) That, in estimating the net profits, the cost of chairs and merchandise should be their net cost delivered upon the fair grounds. (10) That all receipts, from whatever source, should be deposited each day in the bank on the exposition grounds, to be drawn from only upon checks from said parties of the first part. A copy of this contract is hereto attached, and marked 'Exhibit B,' and made a part of this declaration.

"That, under the provisions of this contract, the plaintiff and the said John S. Ford provided the necessary booths and office quarters for the operation of said chair concession on the exposition grounds. That they advanced sufficient capital for the operation of the business to its best advantage. That they furnished at cost chairs in sufficient quantities, and in proper styles, to meet the demand of the public. That they advanced to the said Oliver H. P. Cornell, as general manager, during the period between and including April 26th and October 28th of the year A. D. 1893, the sum of two thousand four hundred (\$2,400) dollars for his personal use, according to contract, and that they otherwise faithfully carried out and completed the provisions of said

contract. That the defendant Oliver H. P. Cornell assumed control of said chair concession at the opening of the World's Columbian Exposition, and continued in charge until its close. That, under the provisions of said contract, it was his duty to render duebills for all money advanced as hereinbefore stated; but that, in violation of this agreement, he rendered duebills, so called, but in fact promissory notes, hereinafter more fully set forth, for one thousand nine hundred fifty-one (\$1,951) dollars only, of the money advanced as aforesaid. That, at the close of the said World's Columbian Exposition, he left the city of Chicago abruptly, without rendering to the plaintiff and the said John S. Ford, or either of them, any final accounting of the business of operating said chair concession; but that an inspection of his books, and the account rendered November 9, 1893, by — Goodspeed (given name unknown), who was employed by the said defendant as bookkeeper, showed that the said defendant, Oliver H. P. Cornell, had taken from the cash drawer, at various times, in violation of the terms of said contract, and without the knowledge or consent of the plaintiff or the said John S. Ford, the total sum of nine hundred fifty-one (\$951) dollars. The account rendered by the said — Goodspeed (given name unknown) further showed that there was a cash shortage in this business of two hundred thirty and forty-seven one-hundredths (\$230.47) dollars, which shortage was caused by the errors and negligence of the defendant Oliver H. P. Cornell and his employes, in direct violation of the terms of said contract, in the operation of said chair concession; and therefore the said defendants, Oliver H. P. Cornell and Eugene B. Barnard, became, and still are, indebted to the said plaintiff, Julius Berkey, and the said John S. Ford, in the sum of three thousand five hundred eighty-one and forty-seven one-hundredths (\$3,581.47) dollars.

"The said plaintiff further alleges that the said Oliver H. P. Cornell, one of said defendants, after the making of said contracts hereinbefore set forth, and in pursuance of the same, under the name of O. H. P. Cornell, made, executed, and delivered to the said plaintiff certain so-called due bills, but in legal effect promissory notes, which said notes are in the words and figures as follows, that is to say: There are five of these notes of different dates, but a copy of one will be sufficient to show the character of all.

"\$300.00

Chicago, May 1st, 1893.

"On demand after date, I promise to pay to the order of Berkey & Ford three hundred dollars, payable according to contract dated April 4th, between Berkey & Ford and Cornell and Barnard, value received.

"O. H. P. Cornell."

"Plaintiff further avers that afterwards, and on, to wit, the 10th day of December, A. D. 1896, all of said above-named notes were duly presented to the said O. H. P. Cornell at Harrisonburg, in the county of Rockingham and state of Virginia, and demand of payment was then and there duly made upon the said O. H. P. Cornell personally; but that the said O. H. P. Cornell then and there refused to pay the same or any part thereof, and still does neglect and refuse to pay said notes.

"Plaintiff further alleges that, during the continuance of the World's Columbian Exposition, a large number of chairs were sold and rented under this concession, so that the gross receipts arising therefrom amounted to the sum, to wit, sixty-six thousand (\$66,000) dollars; but that the said Oliver H. P. Cornell conducted the business in such a reckless and extravagant manner, without regard to the heavy expenses thus incurred, that the net profits amounted to a much smaller sum; that on the 29th day of October, A. D. 1896, the said John S. Ford, for a valuable consideration, duly assigned, transferred, and set over to the said plaintiff, Julius Berkey, all his right, title, and interest, of every name and nature, of, in, and to said contract, marked 'Exhibit B,' and the said notes hereinbefore set forth, a copy of which assignment is hereto attached, marked 'Exhibit C,' and made a part of this declaration."

The following is the contract or agreement entered into between Berkey and Ford, of the first part, and Cornell and Barnard, of the second part, the provisions of which are recited in the declaration:

"This agreement, made and entered into on this fourth day of April, A. D. 1893, at the city of Chicago, county of Cook and state of Illinois, by and between Julius Berkey, of Grand Rapids, Kent county, Michigan, and John S. Ford, of Chicago, Cook county, Illinois, parties of the first part, and Oliver H. P. Cornell, of Ithaca, Tompkins county, New York, and Eugene E. Barnard, of Chicago, Cook county, Illinois, parties of the second part, witnesseth:

"That whereas, the said Julius Berkey has been granted concession by the World's Columbian Exposition, known as the 'Portable Chair Concession,' in which the said John S. Ford has an equal undivided one-half interest, and is jointly responsible, with the said Julius Berkey, to the said exposition, for the faithful performance of the contract made and entered into by and between the said Julius Berkey and the said exposition:

"Now, therefore, the parties of the first part, for and in consideration of the agreements of the parties of the second part hereinafter contained, agree to and with the parties of the second part that the said Oliver H. P. Cornell shall, as general manager for the said parties of the first part at the World's Columbian Exposition at Chicago, take full charge of the operation of the concession for renting portable chairs and selling certain articles of merchandise to be hereinafter mentioned. And the said parties of the first part agree to furnish at cost all chairs of such styles and in such quantities as may be required by the World's Columbian Exposition; also to provide all necessary booths, storehouses, office quarters, and furniture as allowed or required by the said exposition; also to furnish all money to the necessary, proper, and successful management of the business; also to furnish at cost all articles of merchandise which they may be permitted to sell on the exposition grounds in connection with the said portable chair concession. And the said parties of the first part further agree to advance to the said Oliver H. P. Cornell the sum of one hundred dollars (\$100) per week for his personal use, the same to be in lieu of any salary, and to be deducted from the proportion of profits of the said parties of the second part as hereinafter named; also to pay to the said parties of the second part fifteen (15) per cent. of the net profits arising from the portable chair concession, and thirty-three and one-third (33 $\frac{1}{3}$) per cent. of the net profits arising from the sales of any merchandise, should such sales be made in connection with the portable chair concession.

"The parties of the second part, in consideration of the agreements of the parties of the first part herein contained, agree to and with the parties of the first part that the said Oliver H. P. Cornell shall devote his entire time and attention to the management of, and use his best endeavor for the success of, the said business of the portable chair concession, and the sales of any articles of merchandise which may be made in connection with the said chair concession during the six months commencing May 1st and ending November 1st, 1893, and as much more time before and after those dates as shall be necessary for the proper preparation for and closing up of said business; also that they will do all in their power to obtain from the World's Columbian Exposition the privilege of selling a souvenir, known as the 'Honey Bee Perfumery Case,' and hereinbefore mentioned as merchandise; also that if, from any cause, the said Oliver H. P. Cornell shall fail to fulfill the provisions of this contract, the said Eugene E. Barnard shall carry out and complete them; and if, for any cause, both of the parties of the second part fail to perform any and every part of this contract according to its true intent and meaning, then the said parties of the first part may declare the same void, and all the rights and privileges granted therein to be forfeited.

"It is understood by and between all the parties to this contract that the said parties of the second part are to employ and direct the labors of all the employes, and be guided in their conduct of the business by the instructions of of the said parties of the first part, the latter reserving the right herewith to employ in this connection a second assistant manager, who shall be, however, under the direction of the said parties of the second part. It is further understood that the said parties of the second part are to be governed by a certain contract now in force between the World's Columbian Exposition and Julius Berkey. It is further understood that the said parties of the second part shall furnish to the said parties of the first part, upon the signing of this contract, a good and sufficient bond, with sureties approved by the parties of

the first part, in the penal sum of ten thousand dollars (\$10,000), as security for money advanced to the manager, as hereinbefore stated, and for the faithful performance of the provisions of this contract. It is further understood that the said parties of the first part are to be reimbursed for any and all amounts of money invested or other material furnished in the necessary preparation for and continuance of the business as herein contemplated, and that they shall have the right during the operation of said business to draw out from time to time, as they shall choose, such sums of money as they may desire, up to and including twenty thousand (\$20,000) dollars in excess of the amount necessary to reimburse them for any previous investment advanced, after which said parties of the second part shall be allowed to draw their proportionate amount of the net profits, less what may have been advanced to the manager, as hereinbefore mentioned, after which further division of all net profits shall be made between the parties hereto, as their interests may appear. It is understood that the withdrawal of the above-named twenty thousand (\$20,000) dollars does not in any wise interfere with or vitiate the other terms of this contract in the final settlement, which shall be made as soon as possible after the close of the exposition, on October 31st next. Said parties of the first part agree, in case the profits of the business do not amount to the above-named sum of twenty thousand dollars (\$20,000), that the parties of the second part shall have their proportion of the net profits, whatever they may be, as hereinbefore set forth. It is still further understood that the parties of the second part shall give their duebills each and every month for the amount of money advanced to the manager for his personal use during the month previous, and that no salary or interest on money invested is to be charged by or paid to any person interested in this contract, nor is any person to be reimbursed for money or time expended previous to the signing of this contract. It is also further understood that, in estimating the net profits, the cost of chairs and merchandise, which shall be their net cost delivered upon the exposition grounds, together with the costs of booths, storehouses, other necessary appliances, and all other necessary expenses for the proper management of the business, together with the percentage of the receipts paid to the exposition authorities, shall first be deducted from the gross receipts, and the remainder shall be the net profits. In calculating the division of expenses between the 'Chair Concession' and the 'Honey Bee Perfumery Case,' the former shall be charged with two-thirds of the general expenses, and the latter with one-third. It is still understood that all the receipts, from whatever source, are to be deposited each day in the bank on the exposition grounds, and to be drawn from thence only upon checks from said parties of the first part. Whatever funds said parties of the second part may need for the proper conduct of the business shall be paid to them or their order upon their requisition in detail. It is further understood that none of the provisions of this contract, either expressed or implied, shall make the parties hereto co-partners, or liable in any way for the obligations of each other incurred otherwise than herein provided.

"In testimony whereof, the said several parties to this contract have hereunto signed their names, the day and year first above written.

"[Signed]

Julius Berkey. [L. S.]

"John S. Ford. [L. S.]

"Oliver H. P. Cornell. [L. S.]

"Eugene E. Barnard. [L. S.]

"In presence of

"Geo. G. Whitworth."

The plaintiff files with his declaration a bill of particulars of his demand, embracing the notes mentioned in the declaration, items of cash advanced, and cash withdrawn from the receipts of the portable chair concession, in violation of the terms of the contract. The last consisted of a large number of items, ranging from \$2.50, the lowest, to \$209.80, the highest. The defendant Cornell files a plea in the case giving his construction of the contract, and claims that there is due to him thereunder, for labor and services performed, a large sum of

money, equal to the plaintiff's demand, which he asks to have set off against the plaintiff's claim. The plea is as follows:

"The said defendant, O. H. P. Cornell, by his attorneys, comes and says that before the making of said writings in the said declaration mentioned and therein described as duebills, to wit, on the 4th of April, 1893, it was mutually agreed and understood between the said plaintiffs and the said defendant that this defendant was to be the manager of a certain concession granted by the World's Columbian Exposition, and that, under the terms of said contract, this defendant was to receive the sum of one hundred dollars per week as compensation as said manager, and he was also to receive fifteen per cent. of the net profits that might arise from the operations of said concession; it being understood, however, that, from the share of this defendant in said net profits, the said sum of \$100 per week should be deducted, though this defendant did not agree to return to said plaintiffs the said sum of \$100 per week, or any part thereof, in the event his share in said net profits should fall short of that amount; it being the true intent and understanding between the parties that, in the event said share of this defendant in the net profits should not equal the sum of \$100 per week, then this defendant was to be paid the said sum as the manager aforesaid. And it was further provided in said contract that, for the purpose of ascertaining the amount of money paid to this defendant on account of his said personal services as manager, he was to execute from time to time what was denominated 'duebills,' in evidence of the amount of money so received by him; but there was to be no right in the said plaintiffs to have and demand of this defendant any part thereof. And this defendant says that, while it is true he did execute the duebills described in said declaration, yet the same did not cover all of the money due to this defendant on account of his salary as aforesaid, because he says that his salary of \$100 per week ran for thirty (30) weeks, to wit, from the 4th day of April, 1893, to the 4th day of November, 1893. And this defendant says that he diligently and faithfully performed the promises and undertakings on his part, and did render the services as manager, aforesaid, during the time aforesaid, without intermission even on Sundays, averaging, at least, fifteen hours a day. And the said defendant says that he is entitled to have the said notes or duebills surrendered and delivered to him, in accordance with the true understanding of said contract; and that there is due to him on account of the services and labor performed by him as aforesaid, under said contract, a large sum of money, which the said plaintiffs have heretofore wholly failed and refused to pay; and that he has sustained damages on account of the breach thereof by the said plaintiffs, amounting to the sum of three thousand dollars, which is still unpaid and due from the said plaintiffs to this defendant; which this defendant is ready and willing and hereby offers to set off and allow the same against the sum of money, if any, that may be payable to the said plaintiffs by this defendant by force of the said duebills or writings upon which this action is in part founded, or the cash alleged to have been received by this defendant. And this the said defendant is ready to verify."

At the time of filing the aforesaid plea, the defendant filed the following affidavit:

"This day, before the undersigned, a notary public in and for the county and state aforesaid, came O. H. P. Cornell, and made oath that, as is shown in the contract between the plaintiffs and this defendant, in the above-entitled cause, filed with the declaration therein, and marked 'Exhibit B,' this defendant is entitled to fifteen per cent. of the net profits that were made and accrued to the parties under said contract, in the operation of what is known as the 'Portable Chair Concession' at the World's Columbian Exposition, and that the gross receipts of said business amounted to a large sum of money, to wit, \$70,000; that the cost of the chairs, some thirty thousand in number, did not exceed five or six thousand dollars, and that after paying to the World's Fair commission the share of the gross receipts to which they were entitled under the contract, and after paying all of the expenses of managing and renting out the chairs, there was left a large profit, and that this affiant, under said

contract, is entitled to his share of 15% thereof; that the gross receipts were deposited in the bank on the exposition grounds, upon which this affiant had no right to check, nor did this affiant handle the money which was taken in from day to day; that this affiant, having been taken sick at the last days of the exposition, was not able to have an accounting with the plaintiffs that he was entitled to in order to ascertain the net profits of the business; that in fact no such accounting has ever been made so far as this affiant knows; that affiant claims his right under said contract to have an accounting, and, as all the books and papers are in the possession of the plaintiffs, he demands and calls for the production of the same, in order that he may properly concert his defenses to the alleged indebtedness set out in said declaration, and that he may be enabled to ascertain what, if any, money is due to him on account of said share in said profits, which this affiant verily believes would amount to a very large sum, over and above the \$100 per week as compensation for his services, if affiant could have a fair and full settlement of the affairs and business of said portable chair concession, but affiant is unable to state what the net profits were, on account of there never having been a settlement, as aforesaid; that affiant is advised that he has a right to call for the production of all of said books and papers, consisting of the ledger, cash-book, daybook, passbook, in the bank, the vouchers representing the cost of the chairs, and all the books and papers connected with the business of said portable chair concession; that this affiant further states that he is unable to fully concert his defenses to the said demand of the said plaintiffs in said suit without the production of said books and papers, and, being advised that he has a right to call for the same, he does hereby call for and demand the production thereof. Given under my hand," etc.

The principle that legal and equitable claims cannot be blended together in one suit in a circuit court of the United States is too well established to admit of discussion. "The constitution of the United States and the acts of congress recognize and establish the distinction between law and equity. The remedies in the courts of the United States are at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles." *Thompson v. Railroad Co.*, 6 Wall. 134; *Robinson v. Campbell*, 3 Wheat. 212; *Hurt v. Hollingsworth*, 100 U. S. 100. The last was a case brought up on writ of error from the circuit court for the Eastern district of Texas. In that state, what is known as the "Code Practice" obtains, and equitable and legal causes of action had been blended in the suit in the circuit court. The supreme court, discussing this question, says:

"In the federal courts, such a blending of equitable and legal causes of action in one suit is not permissible under the process acts of 1792, substantially re-enacted in the Revised Statutes, which declares that, in suits in equity in the circuit and district courts of the United States, the forms and modes of procedure shall be according to the principles, rules, and usages which belong to courts of equity. Rev. St. § 913. This requirement has always been held obligatory upon parties and the court whenever the question has been raised. *Thompson v. Railroad Co.*, 6 Wall. 134. A party who claims a legal title must therefore proceed at law, and a party whose title or claim is an equitable one must follow the forms and rules of equity proceedings as prescribed by this court, under authority of the act of August 23, 1842."

Applying the unquestioned doctrines of these decisions to the pleadings in this case, can the matters therein stated be determined in an action at law? Does not the claim of the plaintiff, as asserted in the special count of the declaration, present an equitable demand, and that must be settled by proceedings to be had in a court of equity? There

is no fixed and inflexible rule by which a court can determine whether the remedy to be pursued should be at law or in equity.

In *Watson v. Sutherland*, 5 Wall. 74, Mr. Justice Davis says:

"The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed by the pleadings."

The pleadings in the case at bar disclose a controversy between the plaintiff and defendant, which requires the construction of contracts, the investigation, adjustment, and settlement of accounts growing out of the relations of the plaintiff and defendant, whether that relation be one of parties between whom there are mutual accounts, or of partners in trade, principal and agent, or trustee and cestui que trust. A court of law, through the medium of trial by a jury of these complicated questions, is entirely inadequate to furnish the plain and adequate remedy which confers upon it jurisdiction. The jurisdiction of courts of equity in matters of account grew out of the failure of the common law to furnish an adequate and legal remedy for their settlement. The only remedy afforded by the common law to compel the settlement of accounts, and to ascertain the balance due, was the ancient (now obsolete) action of account. But the jurisdiction of equity has for ages been exercised in matters of account to which the action of account was not applicable; and this, in consequence of the inadequacy of the existing legal remedy. 4 Minor, Inst. pt. 2, pp. 1215, 1216:

"The jurisdiction of equity, therefore, now extends, not only to cases of an equitable nature, but to many cases where the items constituting the demand are of a character purely legal, and such as are often, although under great disadvantages, the subject of actions at law, other than the action of account, such as debt, covenant, and trespass on the case in assumpsit."

The statement of the plaintiff's demand in the special count of the declaration is of an equitable nature, and of such a complicated character that it cannot be properly settled in an action at law. The demurrer will be sustained as to the special count in the declaration, but without prejudice to the plaintiff's right to plead on the equity side of the court.

In re DOWD.

(District Court, N. D. California. November 21, 1898.)

No. 11,704.

ARMY AND NAVY—ENLISTMENT OF MINOR—SUBJECTION TO COURT-MARTIAL.

The enlistment of a minor in the army without the consent of his parents or guardian, required by Rev. St. § 1117, is not void, but voidable only, and while he remains in the service under such enlistment the minor is amenable to the articles of war, and cannot be remanded to the custody of his parents by a civil court on a writ of habeas corpus while undergoing a sentence imposed on him by a court-martial for a violation of such articles.

This was a hearing on a writ of habeas corpus sued out for the release of Thomas H. Dowd, a soldier in the United States army.

Lennon & Hawkins, for petitioner.

H. S. Foote, U. S. Atty.

DE HAVEN, District Judge. The writ of habeas corpus was issued in this proceeding upon the application of Esther Dowd for the release of her son, Thomas H. Dowd, an enlisted soldier in the army of United States volunteers. The petition for the writ alleges, and the fact was shown by the evidence given upon the hearing, that Thomas H. Dowd is a minor under the age of 18 years, and that he enlisted as a United States volunteer on the 3d day of July of this year, without the written consent of his parents, who were then entitled to his custody and control. If these were all the facts, the petitioner would be entitled to the relief which she seeks. But it appears from the return and the evidence offered to sustain it that on October 27th of this year the said Thomas H. Dowd was duly convicted by a court-martial of the military offense of being absent from his post without the consent of his commanding officer, and thereupon sentenced to imprisonment in the post guard house at Ft. Baker, Cal., for the term of 30 days; and at the date of the issuance of the writ he was in actual confinement pursuant to such sentence. Section 1117 of the United States Revised Statutes provides:

"No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: provided, that such minor has such parents or guardians entitled to his custody and control."

It is urged in behalf of the petitioner that the enlistment of the minor was absolutely void under this section, and that the parents of such minor are entitled to his present custody, notwithstanding the judgment of the court-martial; that, his enlistment being void, that tribunal could not acquire any jurisdiction over his person, and its judgment is, for that reason, void. The case of *In re Baker*, 23 Fed. 30, undoubtedly sustains this contention. So, also, in the case of *In re Grimley*, 38 Fed. 84, the court held that the enlistment of a person over the age of 35 years was void, and gave to the military court no jurisdiction to try him for the offense of desertion from the army, because such enlistment was in violation of section 1116 of the Revised Statutes of the United States, which provides that persons enlisting in the army "must be effective and able bodied men, and between the ages of sixteen and thirty-five years, at the time of their enlistment." This case was, however, reversed by the supreme court of the United States (*In re Grimley*, 137 U. S. 147, 11 Sup. Ct. 54), and it seems now to be settled that the enlistment of a minor contrary to the provisions of the section of the United States Revised Statutes above quoted is not absolutely void, but only voidable (*In re Morrissey*, 137 U. S. 157, 11 Sup. Ct. 57; *McConologue's Case*, 107 Mass. 170); and it necessarily results from this view that the minor is subject to trial and punishment in the manner provided by the articles of war for any offense against such articles committed by him while in actual service under his enlistment (*In re Spencer*, 40 Fed. 149; *In re Kaufman*, 41 Fed. 876; *Solomon v. Davenport*, 30 C. C. A. 664, 87 Fed. 318; *In re Bogart*, 2 Sawy. 396, Fed. Cas. No. 1,596). It follows, therefore, that upon the facts

appearing here the said minor is not now illegally restrained of his liberty, and this court is not authorized to interfere with the execution of the sentence imposed upon him by the judgment of the court-martial above referred to. After that judgment has been fully executed, the petitioner will be entitled to his custody, unless he shall then stand charged with some other military offense, committed since the service of the writ issued herein; and, in view of the near expiration of the term of imprisonment fixed by such judgment, I deem it a proper exercise of discretion to not finally discharge the writ at this time. It is ordered that the said Thomas H. Dowd be remanded to the custody whence he was taken, there to remain until November 28, 1898, and that upon that day, at the hour of 11 o'clock a. m., he be, by the respondent herein, Herbert I. Choynski, produced before this court, and that the respondent then and there show cause, if any there be, why the said Thomas H. Dowd should not be then committed to the custody of the petitioner.

UNITED STATES v. FOUR BOTTLES SOUR-MASH WHISKY.

(District Court, D. Washington, E. D. December 3, 1898.)

1. INDIANS—TITLE TO PUBLIC LANDS—EXTINGUISHMENT OF INDIAN TITLE.

The government of the United States is the primary source of title to the public lands; the Indians having only a right of occupancy, which may at any time be extinguished by congress.

2. SAME—INTRODUCING LIQUORS INTO INDIAN COUNTRY—MINERAL CLAIMS WITHIN RESERVATION.

The provisions of the act of July 1, 1898 (St. 2d Sess. 55th Cong. p. 593, c. 545), authorizing the entry of mineral lands in the Colville Indian reservation, in the state of Washington, under the laws of the United States relating to the entry of mineral lands, necessarily gave prospectors and miners the right to explore the reservation for minerals, and authorized citizens who make discovery of valuable minerals therein to locate claims and work them as required to obtain title under the mineral land laws. The effect of such a valid location is to segregate the claim from the reservation, and extinguish the Indian title thereto, which is merely possessory, so that the land embraced in such location ceases to be Indian country, within the meaning of Rev. St. §§ 2139, 2140, and 29 Stat. p. 506, c. 109, prohibiting the introduction of liquors into the Indian country, and becomes subject to the jurisdiction of the state.

3. SAME—TRANSPORTING LIQUOR ACROSS RESERVATION.

A stock of liquors is not introduced into the Indian country by being transported across a reservation to a place where it may be lawfully sold, and is not subject to seizure while in transit, or after it reaches its destination.

This is a proceeding by the United States for the forfeiture of certain liquors. Heard on demurrer to a plea filed by the claimant.

Wilson R. Gay, U. S. Atty., and C. E. Claypool, Asst. U. S. Atty.
F. C. Robertson, for claimant.

HANFORD, District Judge. This is a case of seizure under the statutes of the United States prohibiting the introduction of spirituous or other intoxicating liquors into the Indian country. Rev. St. U. S. §§ 2139, 2140; 29 Stat. p. 506, c. 109. The information filed by the United States attorney charges that on the 10th day of August, 1898,

one Daniel P. Bagnell did unlawfully take upon the Colville Indian reservation, in the state of Washington, a stock of spirituous liquors, wines, and malt liquors, and did establish a saloon in a building upon said reservation, contrary to the provisions of sections 2139, 2140, Rev. St. U. S., and afterwards the Indian agent in charge of said reservation did seize and take into his possession as such officer, on behalf of the United States, all of said liquors, together with the stores, packages, and other goods introduced upon the reservation by said Bagnell, found within said saloon; and it concludes with a prayer for a decree that all of said merchandise be condemned as forfeited to the United States. Daniel P. Bagnell has appeared as claimant, and filed an answer and plea, by which he denies that the goods were taken upon the reservation unlawfully. The plea sets forth a provision contained in the act of congress of July 1, 1898, making appropriations for the current contingent expenses of the Indian department, which is as follows:

"That the mineral lands only in the Colville Indian reservation in the state of Washington, shall be subject to entry under the laws of the United States in relation to the entry of mineral lands: provided, that lands allotted to the Indians or used by the government for any purpose or by any school, shall not be subject to entry under this provision." St. U. S. 2d Sess. 55th Cong. p. 593, c. 545.

And it further alleges that under the license, and in the exercise of the rights granted by said act of congress, and in accordance with the general laws relating to the mineral lands of the United States, and the local laws, customs, and regulations of miners, one William Mediking, a citizen of the United States entitled to make location of mineral claims, went upon the said Colville reservation, and made discovery there of gold in paying quantities, and located the ground containing the deposits of gold which he had discovered, and claimed the same by marking the boundaries of his claim, and posting notices describing the same, and in other respects complied with the law so as to acquire a valid right to said claim, and immediately after making such location, on the 20th day of July, 1898, said William Mediking went into the exclusive possession of said claim, and thereafter the claimant, with the consent of said Mediking, erected a house upon said claim, and after obtaining a retail liquor dealer's license from the county within which said reservation is situated, and also from the collector of internal revenue of the United States, he placed in said house the stock of liquors and other merchandise which was seized by the Indian agent, and which is the identical property described in the libel of information; that said seizure was made in the house erected by the respondent upon said mining claim, and at the time of said seizure the claimant had not sold any of said merchandise to any Indian, and it was not intended by him to sell or dispose of intoxicating liquors to Indians, but said merchandise was placed in said house to be sold to white people only. The case has been argued and submitted upon a demurrer to this plea.

The right decision of the question whether or not the goods in controversy have been forfeited to the United States by reason of unlawful introduction into the Indian country of intoxicating liquors depends

upon whether or not a valid location of a claim to mineral lands situated within the Colville Indian reservation has the effect to extinguish the right of Indians to exclusively occupy the area embraced within such mineral claim. As I read the decisions of the supreme court of the United States, it is settled that the phrase "Indian country," as used in the Indian intercourse act of 1834, comprehends all of the public domain of the United States west of the Mississippi river, and not within the states of Missouri, Louisiana, and Arkansas, to which the Indian title had not at the date of that act been extinguished, but that as the white people have since the date of said act advanced westward and occupied the country, and as the original right of the Indians as occupiers has been ceded by treaty stipulations between them and the government, or extinguished by acts of congress providing for the settlement and occupation of the country by white people, this broad domain has ceased to be Indian country, except the portions thereof which the Indians retain the exclusive right to occupy. In the opinion of the supreme court, by Mr. Justice Miller, in the case of *Bates v. Clark*, 95 U. S. 204-210, the definition of "Indian country" is given as follows:

"The simple criterion is that, as to all lands thus described, it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of congress, unless by the treaty by which the Indians parted with their title, or by some act of congress, a different rule was made applicable to the case."

And later, in the case of *Ex parte Crow Dog*, 109 U. S. 556-572, 3 Sup. Ct. 396, in the opinion of the court, Mr. Justice Matthews said:

"In our opinion, that definition now applies to all the country to which the Indian title has not been extinguished, within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes; excluding, however, any territory embraced within the exterior geographical limits of a state, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union. * * *"

The constitution of this state contains a compact with the general government in accordance with the provisions of the enabling act under which the state was admitted into the Union, providing, among other things, that, until the Indian title shall have been extinguished by the United States, all Indian lands within the state shall remain under the absolute jurisdiction and control of the congress of the United States. So that the Colville reservation was by the compact and the enabling act excluded from the jurisdiction of the state government, and continues to be Indian country, as defined by the decisions of the supreme court, until the exclusive right of the Indians shall have been extinguished by act of the United States government. It is also settled by the decisions of the supreme court that the government of the United States is the primary and ultimate source of title to the public domain, and the Indians are not recognized as having any title, except the mere right of occupancy, which congress has the right at any time to extinguish. *Johnson v. McIntosh*, 8 Wheat. 543-604; *U. S. v. Cook*, 19

Wall. 591-594; *Spalding v. Chandler*, 160 U. S. 394-407, 16 Sup. Ct. 360.

The power to divest the Indian title being vested in congress, it becomes necessary to consider the act of 1898, authorizing the entry of mineral lands within the Colville reservation, and to ascertain the necessary effect which it has upon mineral lands located and claimed by citizens in accordance with the laws and regulations for acquiring title to lands of that description. The statute does not in terms throw the reservation open to exploration by prospectors and miners, nor abridge the right of Indians to continue in the exclusive right of occupancy, but that is the necessary consequence of the law; for it does provide that the mineral lands in the Colville Indian reservation shall be subject to entry under the laws of the United States in relation to the entry of mineral lands. I hold that these words confer the right upon citizens of the United States to become proprietors of mineral lands within the Colville reservation, in limited quantities. The lands can only be entered under and in accordance with the general laws of the United States in relation to the entry of mineral lands. This implies the discovery of precious metals in paying quantities in the lands to be entered, and the doing of work upon the claims necessary to develop and successfully operate mines. It requires labor and the use of implements, and carries with it the right to go upon the land for the purpose of working mines therein, the right to have habitations for workmen, and to take there implements and conveniences for doing the work, all of which is inconsistent with the exclusive right of occupancy in the Indians. The word "entry," as it has been heretofore used in the land laws of the United States, "means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim. * * *" *Chotard v. Pope*, 12 Wheat. 586; *Denny v. Dodson*, 32 Fed. 910. Evidently congress used the word in the statute now under consideration as a concise, and yet comprehensive, term to express the exact signification that has heretofore been given to the word in the decisions of the courts, the acts of congress, and in land-office practice, and I think, also, to include all the proceedings essential to perfect the right of a discoverer and locator to a mining claim; otherwise the provision is meaningless. The act certainly was not intended to authorize any person to file in the land office a claim to a piece of land, unless he had previously discovered and developed a mine therein. I hold that the law under consideration must necessarily have been intended by congress to authorize prospectors and miners to explore the Colville reservation for the purpose of developing its mineral resources, and to authorize citizens who make discoveries of valuable minerals therein to locate claims and work them, and that a valid location of a mineral claim has the effect to segregate such claim from the reservation, and extinguish the Indian title thereto, so that the land embraced in such mineral location ceases to be Indian country.

A stock of liquors is not introduced into the Indian country by being transported across an Indian reservation to a place where the owner may lawfully dispose of it, and is not subject to seizure while in transit,

nor after arrival at its place of destination. U. S. v. Carr, 2 Mont. 234.

For the reasons given in this opinion, this court has heretofore quashed an indictment accusing the claimant of violating the laws prohibiting the introduction of spirituous liquors into the Indian country, founded upon the facts set forth in the pleadings herein, and for the same reasons the demurrer to the plea of the claimant is overruled.

UNITED STATES GLASS CO. v. ATLAS GLASS CO. et al.

(Circuit Court of Appeals, Third Circuit. December 6, 1898.)

1. PATENTS—INFRINGEMENT OF PROCESS—IDENTITY OF METHODS.

Two processes cannot be said to be substantially alike where the successive steps which they involve are different, and, where several of the steps which are requisite to the one are wholly omitted from the other, identity of method cannot exist.

2. SAME—METHOD OF MANUFACTURING GLASSWARE.

The Arbogast patent, No. 260,819, for an improvement in the method of manufacturing glassware, construed, and *held* not infringed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

This was a suit in equity by the United States Glass Company against the Atlas Glass Company, Robert J. Beatty, president, and J. W. Paxton, secretary and treasurer, for the infringement of a patent. From a decree dismissing the bill, the complainant appeals.

George H. Christy, for appellant.

Wm. L. Pierce, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and BUTLER, District Judge.

DALLAS, Circuit Judge. This is an appeal from a decree of the circuit court for the Western district of Pennsylvania dismissing a bill for alleged infringement of letters patent No. 260,819, issued on July 11, 1882, to Philip Arbogast, for an improvement in the method of manufacture of glassware. 88 Fed. 493. The thoroughness and particularity with which the court below has dealt with the material subjects of controversy relieves us from undertaking any extended or detailed discussion of them. We are unable to concur in the learned judge's understanding of the patentee's disclaimer, but it is not necessary, to the acceptance of the conclusion arrived at by him upon the whole case, that we should do so; for, even if all that was disclaimed was a process of pressing and blowing in a single mold, yet we are of opinion that Arbogast neither invented nor claimed any method which the appellees have appropriated. His invention was a meritorious one, and the validity of the patent which secured it to him need not be questioned. It should not be narrowed by illiberal construction, but the scope accorded to it by the court below is quite as ample as, in view of the prior state of the art and of its own terms, it is entitled to have. To give it any more inclusive interpretation, it would, we think,

be necessary to hold that it vested in the patentee, not only a monopoly of all that he had invented, but also of all that might thereafter be added to the art in the same line of advance. The claim, after informing us that the improvement consists in pressing the mouth or neck to finished form with a dependent mass of glass, and then withdrawing the plunger, proceeds to state that the article is then to be removed from the press mold, and finally inserted in a separate mold, and blowed in, to form the body. With the process thus described the method of the defendants does not conflict. They have adopted means, and very ingenious means, by which any necessity for removing the article from the press mold, and inserting it in a separate mold, is avoided; and in the manufacture of "Mason Jars," in which the defendants are engaged, their resultant distinctive mode of procedure is, if not essential, decidedly advantageous.

Two processes cannot be said to be substantially alike where the successive steps which they involve are different; and where, as in this instance, several of the steps which are requisite to the one are wholly omitted from the other, identity of method cannot exist. But this subject has been fully and adequately treated by the learned judge of the court below, and need not be further considered. We think his opinion fully supports the decree; and as it is clear to us, as it was to him, that infringement was not shown, that decree is affirmed.

CARY MFG. CO. v. NEAL et al.

(Circuit Court, S. D. New York. November 22, 1898.)

1. PATENTS—ANTICIPATION—DESIGN PATENT.

An inventor who has obtained a patent for an article of manufacture, which patent discloses the design thereof, cannot, on an application made two years later, obtain a valid patent for such design.

2. SAME—DESIGN FOR BOX-FASTENER.

The Cary design patent, No 28,142, for a box-fastener, is void for anticipation by patent No. 450,753 to the same patentee for the article itself.

This is a suit in equity by the Cary Manufacturing Company against Bernard B. Neal and others for infringement of a patent.

A. G. N. Vermilya, for plaintiff.

Robert Stewart, for defendants.

WHEELER, District Judge. This suit is brought upon design patent No. 28,142, applied for October 15, 1894, dated January 11, 1898, and granted to Spencer C. Cary, for a box-fastener. The specification states that:

"The design consists, primarily, in a box-fastener having ends bounded by curved lines and upwardly or downwardly extending prongs, with openings in the material, the main surface of which is plain, and the essential features are a plain, flat body, bounded at the sides by substantially straight lines, and at each end by a curved line, having near each end openings in the face, and prongs extending from the sides of the openings at substantially right angles to the surface of the main body of the fastener."

The claim is for:

"The design for a box-fastener substantially as herein shown and described."

The answer sets up, among other patents, as anticipations, No. 450,753, dated April 21, 1891, and granted to Cary.

It is said that an inventor of a machine or manufacture may have a patent for the thing, and another for the design of the thing. This may be true; but the description of the thing would show the design, and an inventor cannot have a valid patent applied for two years later for what is described in a prior patent to himself, any more than in one to another. *Campbell v. James*, 104 U. S. 356. What is in that patent may limit the right, therefore, to a valid patent for what is in this. The specification there states:

"My invention consists in a box-strap composed of a metal strip or plate of suitable length, the edges of the opposite ends of which are curved in outline, and having a corrugation at or upon and along its side edges and said curved end edges, and provided with tongues, one or more, at or near the strap ends, and within the line of the said edge corrugations cut from the strap-body, and bent at an angle to the face of the strap which is opposite to the corrugated face thereof, substantially as and for the purpose hereinafter set forth." "I am aware that box-straps have been heretofore formed with tongues cut from the strap-body and bent at an angle to the face thereof, and hence I make no claim thereto, broadly, herein. I am also aware that box-straps have been formed with their end edges curved in outline, and therefore I make no claim to such form of the said edges, broadly, herein."

And the claim is for:

"As an article of manufacture, a box-strap composed of a metal plate or strip, the end edges of which are curved in outline, and having a corrugation which is continuous at, along, and upon the side edges, and said end edges and tongues at or near the strap ends cut from the strap-body within the line of said edge corrugation, and bent at an angle to the face of the strap which is opposite to the corrugated face thereof, substantially as and for the purpose set forth."

What are there called tongues cut from body of the strap, and bent at an angle to the face, are the same as what are in the patent in suit called prongs extending from the sides of the openings at substantially right angles to the body. These extracts from that patent show that a plain strap-body, with curved ends, which would imply straight sides, and prongs extending at an angle from openings which would or well might be substantially a right angle, were known to the inventor before, and disclaimed, and that he claimed and obtained a patent then for the addition of a corrugated edge all around. The patent in suit is for the same thing, in substance, without the corrugated edge then added. The design of the thing disclaimed would be as well disclaimed as the thing itself, and another patent for it as well barred, if the difference in design arising from leaving off the corrugated edge would be at all patentable. The inventor says in his testimony for the plaintiff:

"I find that patent No. 450,753 is different from the design in issue, in that it has a corrugation on the face of the same, and not a plain, flat body, and that the openings in the same are of different shape, and also the prongs that are thrown up at right angles with the face are corrugated, and also of different shape from the device in issue."

But the corrugation described is upon the edge, leaving within it a plain, flat body; and no mention is made in the specifications or claims of either patent of the shape of the openings or prongs, or of any differences between them. According to these views, the patent in suit seems to be wholly without foundation. Bill dismissed.

CUSHMAN PAPER-BOX MACH. CO. v. GODDARD et al.

(Circuit Court, D. Massachusetts. December 5, 1898.)

No. 611.

PATENTS—INFRINGEMENT—PAPER-BOX MACHINE.

The Cushman patent, No. 364,161, for an improvement in paper-box machines, in view of the prior state of the art, and the doubtful utility of the machine, is limited to the form of mechanism described and shown in the specification and drawings, and is not infringed by a machine in which the blank for the box-end is carried into position on the box-body by different means, which are not the equivalent of those described.

This is a suit in equity by the Cushman Paper-Box Machine Company against Harry W. Goddard and others for the infringement of a patent.

William A. Macleod, for complainant.

Edward S. Beach, for defendants.

COLT, Circuit Judge. The patent (No. 364,161) upon which this is suit is brought was granted May 31, 1887, to George H. Cushman, and relates to an improvement in paper-box machines, whereby a blank which is to form one end of the box is pasted, and then automatically fed forward into position above the box-rest, where its pasted sides are brought into contact with the body of the box. The patentee, in his specification, says:

"My invention consists, essentially, in the combination, with a pasting mechanism, a box-rest, and a presser plate, of an automatically operating feeder, whereby the pasted end blank is transferred from the pile of blanks into position to be forced closely in contact with the end of the box-body. As the end blank is being fed into position under the presser-plate, it travels in a guide-way, which insures the correct presentation of the end blank to the box-body, thereby enabling the end blank to be applied uniformly."

The broad first claim of the patent is the only one in controversy:

"(1) In a machine for the manufacture of paper boxes, a box-rest for the box-body, and a presser-plate co-operating therewith, pasters, and guides to hold the end blanks above said pasters, combined with a reciprocating feeder, substantially as described, whereby the pasted end blanks are automatically fed from the guides to a position between the presser-plate and box-rest, to be united to and form an end of the box-body, substantially as described."

This claim refers to a combination of five elements: (1) A box-rest for a box-body; (2) a presser-plate co-operating therewith; (3) pasters; (4) guides to hold the end blanks above the pasters; (5) a reciprocating

feeder by which the pasted end blanks are automatically fed from the guides to a position between the presser-plate and box-rest.

Only one machine was constructed under the patent prior to the beginning of this suit, when a second machine was built for the purposes of this case. While the machine may be practically operative, neither its utility nor inventive scope is such as to warrant the court in giving that liberal construction to the patent which is sometimes done where the invention marks an important advance in the art. Each of the elements recited in the first claim was well known at the date of the invention. It is true that the prior art does not disclose in a box-end machine the specific combination of all the elements found in the claim. In paper-box machines, box-rests, presser-plates, pasters, guides to hold the blanks, and reciprocating feeders were old. In machines for making the ends of paper boxes, as shown in the Glazier machine, box-rests, presser-plates, pasters, and guides to hold the blanks were old. What Cushman did was to incorporate a reciprocating feeder into a special kind of box machine. While he may be entitled to a patent for the specific mechanism by which he accomplished this improvement, and may hold others as infringers who use the same or what are clearly equivalent means to bring about the same result, he cannot claim broadly and without limitation the combination of a box-rest, presser-plate, pasters, guides to hold the blanks above the pasters, and a reciprocating feeder by which the pasted end blanks are fed from the guides to a position between the presser-plate and box-rest. The prior state of the art, and the doubtful utility of the machine, forbid the court from treating this claim of the patent as if it covered a primary invention.

In approaching this claim, we are met with the difficulty as to its proper construction. It does not in terms include the guide-way, or the means employed to guide the end blank into position between the box-rest and presser-plate, and insure its proper presentation to the box-body. These means constitute a very necessary and important part of the Cushman device, and are made an element in other claims of the patent. The claim, after reciting the co-operating elements, says, "whereby the pasted end blanks are automatically fed from the guides to a position between the presser-plate and box-rest." Now, it is perfectly clear that this cannot be done without the guide-way to hold the blank, and properly present it to the box-body. The reciprocating feeder alone will not do this work, and it must co-operate with some form of guiding mechanism to make the combination operative to accomplish the result set forth in the claim. If the claim be construed literally, and so exclude the guide-way mechanism, it would be inoperative, and should perhaps be held to be invalid, in view of the language of the claim. If the claim be construed to include by implication the guide-way mechanism, the defendants do not infringe, because that device or its equivalent is not found in their machine. We do not think the forward projecting fingers of the reciprocating carrier and the spring fingers below the presser-bed in defendants' machine can be said to be the equivalent of the swinging grooved guide rails, f², of the Cushman machine, upon any principle of construction which can properly be applied to this invention.

But, assuming that the claim is valid for the combination of elements specifically enumerated, it must still be limited by the prior art to the form of mechanism described and shown in the specification and drawings, or what is plainly the equivalent. The defendants' machine is quite different in its organization. The pasting mechanism of complainant's machine, which is somewhat complicated in construction, must be placed directly under the pile of end blanks in order to do its work. In defendants' machine the paste is applied by a rotary device below and in front of the stack of blanks, and while the lowermost end blank is advancing on the reciprocating carrier. The vertical guides for holding the blanks in defendants' machine, unlike the complainant's, have no reciprocating movement towards the pasters; neither do they hold the end blanks above the pasters, or exercise any control or guidance by which the surface to be pasted is determined. The Cushman carrier operates more as a pusher, and quite differently from the defendants' carrier with its forward projecting fingers. But, without entering into further details, we are of opinion that the blank in defendants' machine is pasted and transferred from the pile of blanks into position on the box-body in a materially different manner from that described by Cushman in his patent, and by means which cannot be considered equivalent, in view of the scope of the Cushman invention, and that, therefore, there is no infringement. Bill dismissed.

UNITED STATES PLAYING-CARD CO. v. SPAULDING et al.

(Circuit Court, S. D. New York. November 23, 1898.)

PATENTS—APPARATUS FOR PLAYING DUPLICATE WHIST.

The Bisler patent, No. 525,941, for an apparatus for playing duplicate whist, held valid and infringed as to claims 1, 2, and 4.

This is a suit in equity by the United States Playing-Card Company against A. G. Spaulding & Bros. for infringement of a patent.

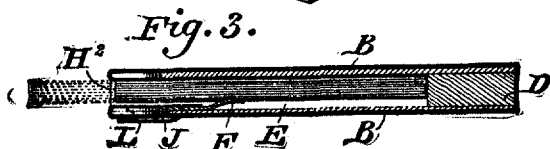
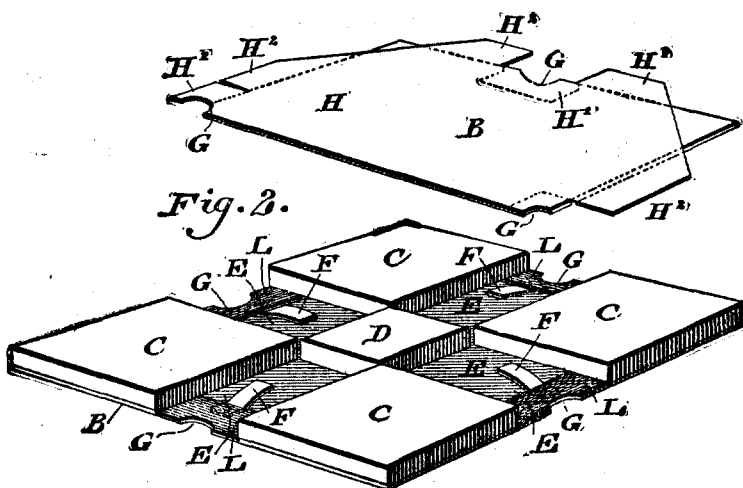
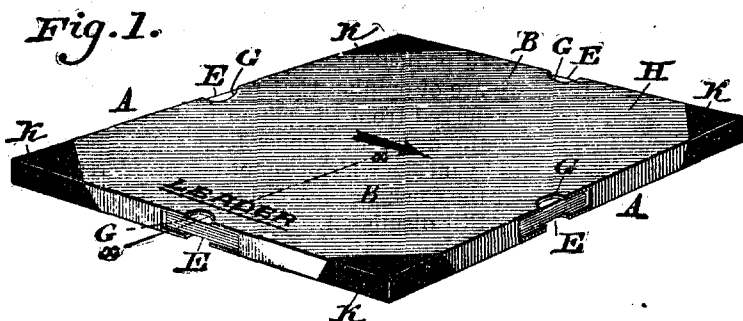
Arthur v. Briesen, for plaintiff.

Fred. L. Chappell, for defendants.

WHEELER, District Judge. This suit is brought for alleged infringement of patent No. 525,941, applied for December 30, 1893, dated September 11, 1894, and issued to Gustav A. Bisler, for apparatus for playing duplicate whist; consisting of two square plates, with corner blocks between, forming sides, and a center block, whose sides form the inner ends, of pockets, in which the hands of cards are kept, by springs, in their original order, showing the lead, for playing again in the same order with a different lead, with recesses in the edges of the plates for the fingers to withdraw the hands of cards. The specification refers to drawings showing the parts by letters, and the claims are for:

(1) An apparatus for playing duplicate whist, consisting of a tray composed of plates, with intervening corner and central blocks, forming pockets closed on their sides and inner ends, and open at the outer edge of the tray, sub-

stantially as described. (2) A tray for the purpose set forth, consisting of the plates, B, B, having the recesses, G, in their sides, the intervening blocks, C and D, forming the pockets, E, closed at their sides and inner ends, and the springs, F, in said pockets, said parts being combined substantially as described. (3) A tray for the purpose named, consisting of two plates having recesses in their sides, blocks between said plates, forming pockets closed at their sides and inner ends, and open at their outer ends, and an attaching sheet for said plates, said sheet being attached to one plate, and having flaps turned under the portion of the plate at the finger portions hereof, and flaps turned over the said blocks and secured to the other plate, said parts being combined substantially as described. (4) A tray for the purpose named, consisting of a tray having pockets therein closed at their sides and inner ends, and open at the outer edges of the tray, springs in said pockets for holding cards therein, an attaching sheet for said plates, and corner pieces on said plates, said plates having recesses in their edges, and said parts being combined substantially as described.



Several patents are set up as anticipations, the most similar and important of which are No. 462,448, dated November 3, 1891, and granted to Paine and Sebring, for a square plate, with rubber straps on each side, for holding the hands of cards; No. 464,469, dated December 1, 1891, and granted to one Woodbury, for four flexible pockets attached to a square center, and folding together upon it, for holding the hands of cards; No. 481,995, dated September 6, 1892, and granted to one Work, for a square plate, with a divisional compartment on each corner, for holding the hands of cards; and No. 514,302, applied for March 29, 1893, dated February 6, 1894, and granted to one Butler, for an open tray in the form of a cross, with receptacles at the extremities, and elastic bands around them, for holding the hands of cards; and each structure providing a mark for distinguishing the lead. While each of these shows an apparatus for holding the hands of cards in order, by four receptacles, in the order of the four players, on or in a plate or tray, or about a square center, and therefore they leave only room for improvements upon all of them by later inventions, obviously enough this invention is different from any of them, and occupies room left between them; and the first, second, and fourth claims of the patent seem valid for the differences specified in them. The covering sheets of the third claim do not seem patentable.

The alleged infringement is of two kinds, in one of which (the Kalamazoo tray) the lower plate is larger than the upper, with a spot in it raised in each pocket, for retaining the cards in place, and the corner and central blocks are not square, but rectangular, so placed as to be near enough, without touching each other, to form the pockets that will hold the cards, without being actually closed; and in the other, which is made according to patent No. 555,903, dated March 3, 1896, and granted to one Johnson, for such an apparatus, four pockets are formed in the corners between the plates by narrow inclosing and partition strips, with recesses through the inclosing strips and in the plates for the fingers, and openings through the upper plate next to the inside of the remaining ends of the inclosing strips for inserting the cards, which are retained by these ends. The important improvement patented to Bisler was the pocket formed between the two plates on each of the four sides by the blocks, to which the recesses for the fingers and the spring were incidental. The pockets of the infringements would be closed for this purpose when they were tight enough to well hold the cards; inclosing and partition strips would be blocks in the corners and center, although not square in length and breadth, when so placed there as to form a pocket at each side, although nearer to one end of the side than to the other; and the raised spot in the plate would be a spring, when it should cause pressure upon the cards, by elasticity, to retain them. According to these views, both of these structures appear to infringe the first and fourth claims; and the Kalamazoo one, the second, also. Decree for plaintiff.

(December 7, 1898.)

Upon the settlement of the interlocutory decree herein, attention is called to an error, in supposing that one alleged infringement is made

according to Johnson patent, No. 555,903, as testified by experts on examination in chief, but corrected on cross-examination not noticed. The interior space between the pockets is filled by a block, instead of being left vacant between the partition strips of that patent. The operation of the pockets appears to be the same in either case; the filled space and vacancy being, in difference, wholly immaterial. The structure is accordingly held to infringe. Decree accordingly.

PALMER PNEUMATIC TIRE CO. v. LOZIER.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1898.)

No. 512.

1. PATENTS—EQUITY SUIT FOR INTERFERENCE—SCOPE OF JURISDICTION.

In a suit in equity, under Rev. St. § 4918, to obtain an adjudication between interfering patents, the court is not limited to a determination of the question of priority of invention between the interfering patentees. The statute necessarily presupposes a patentable invention as the subject-matter of the litigation, and if it should appear that neither of the patents in suit is valid, for want of such patentable invention, the court is not required to perform the useless task of considering and adjudicating priorities between them, but should dismiss the bill, and deny relief to either party.

2. SAME—TWO PATENTS FOR SAME INVENTION.

A patentee cannot extract or reserve an essential element of his invention, without which a patent would not have been granted, and make it the subject of a subsequent valid patent. When once the invention has been used as the consideration for a grant, there is nothing on which a second grant can be supported.

3. SAME.

Where the characteristic and essential element of a patented article is made the subject of a later patent, the last, and not the first, patent is void, though the invention of such element preceded that of the completed article.

4. SAME—FABRICS FOR PNEUMATIC TIRES.

The first three claims of the Palmer patent, No. 493,220, for a fabric made of elastic and impervious material, such as rubber, having imbedded within the surface threads substantially out of contact with each other (used chiefly in pneumatic tires), *held* void in a suit for interference under Rev. St. § 4918, on the ground that such fabric constituted an essential element of the invention covered by the prior patent, No. 489,714, granted to the same patentee for a rubber tube for pneumatic and other purposes. The Hass patent, No. 539,224, for the same fabric, also *held* void, on the ground that such fabric was an essential feature of the invention covered by the prior patent, No. 495,975, to the same patentee, for an improvement in pneumatic tires.

84 Fed. 659, reversed.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This was a suit in equity by the Palmer Pneumatic Tire Company against Henry A. Lozier to determine a question of interference between certain patents, both relating to "a new and useful improvement in fabrics." From a decree adjudging defendant's patent to be prior in point of invention and reduction to practice (84 Fed. 659), the plaintiff appeals.

Douglas Dyrenforth, for appellant.

Wm. A. Redding, for appellee.

Before TAFT, Circuit Judge, and SEVERENS and CLARK, District Judges.

SEVERENS, District Judge. This is a suit in equity brought in the court below for the purpose of obtaining an adjudication with respect to the validity of certain patents, alleged to be interfering patents, of which the appellant is the owner of one, viz. patent No. 493,220, issued March 7, 1893, to the appellant, the Palmer Pneumatic Tire Company, as the assignee of John F. Palmer, upon an application filed by him November 17, 1892, the first three claims of which are here involved. The other patent (that owned by the appellee) is No. 539,224, and was issued to the appellee, as assignee of Rudolph W. Huss, on May 14, 1895, upon an application filed by the latter October 9, 1893. These patents, respectively, cover an invention which relates to a product. This product, which is one in very extensive use in the manufacture of pneumatic tires for bicycles and other wheels, is, in general terms, described as a fabric made of elastic and impervious material, such as rubber, having imbedded within the surface threads substantially out of contact with each other. As will be seen from what has just been stated, the appellant's patent is first in order of time, by a period of about two years and two months, and had actually been issued seven months before the application for the Huss patent was filed; and it is claimed and insisted by the bill that Palmer was in fact the first inventor of the product therein described, and that, therefore, the appellant is entitled to a decree against the Huss patent, as one not lawfully issued. The appellant, on the other hand, contends that Huss was first in making the invention; that his delay in applying for a patent is excused on just reasons; that, therefore, the latter patent is entitled to precedence; and that the offending claims of the Palmer patent should be declared void.

The suit is founded upon section 4918 of the Revised Statutes of the United States, which is as follows:

"Sec. 4918. Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment."

The pleadings raised no issues, in terms, except those which involve the question of priority in making the invention, as between Palmer and Huss, and one tendered by the defendant, as to whether Palmer had not anticipated himself by a former patent. The defendant, in his answer, included a cross prayer (if it may be so termed) that the complainant's patent be held and decreed to be void,—a course evidently adopted upon the authority of cases holding that the defendant may have affirmative relief in this way without filing a cross bill. Some-

what voluminous proofs were taken, and the case was brought to hearing, whereupon it was determined, upon consideration of the evidence, that Huss was the first inventor of the fabric in question. The Palmer patent was for that reason declared to be void, and a decree entered accordingly. 84 Fed. 659. The complainant has brought the case here by appeal, and makes as many as 27 assignments of error in the conclusions of the court below,—a number quite sufficient for the presentation of the case, upon every possible aspect of which it is susceptible. We therefore take up the consideration of the case without precise regard to the language of the assignments of error, or the order in which they are presented.

The first question presented by the record is one which touches the scope of the jurisdiction. It is agreed by counsel on both sides that the only question which the court has authority to consider and determine is that of the relative priority of the dates of the invention by Palmer and Huss, respectively, although much of the argument of the counsel relates to wider questions. It is said that section 4918, above quoted, was intended to subserve the single purpose of enabling parties to obtain an adjudication of priority of invention covered by interfering patents, with the consequent authority to declare the patent of the later inventor void. Consequently, it is urged, the court has no authority to inquire whether the supposed invention which is the subject of the controversy is patentable or not. It appears from the opinion of the learned judge who decided this case in the court below, found in the record, that this construction of the statute was there accepted upon the authority of certain cases cited in the opinion, without any original consideration of the question by him; but we are unable to agree that the court is so rigidly tied down as such a construction of the statute would imply. On the contrary, we think the court is bound to determine whether, upon identifying the subject-matter of the interfering patents, the invention therein stated is patentable. If it is not, and the court should go on and pronounce a decree of nullity against one of the patents, it would do so at the instance of one who has no right to protect, and consequently no standing on which to assail his adversary. The parties would not stand on equal ground in such a litigation, and the power of the court would be perverted to the determination of an unprofitable inquest as to who was the first discoverer of a nullity. The outcome would be that, while one pretender would be dislodged, the other would occupy the field unscathed. We think that if, upon inspection of the patents, or in the course of the investigation it must make in order to determine the nature of the alleged invention, the court should see that the patents are void for lack of patentable subject-matter, it ought not to proceed to an inquiry as to who first discovered the thing which the court finds to be null, and decree thereon, but should dismiss the bill. Manifestly, it is necessary that the court should know what the invention is which supports the patents, not generally, what the patents are about, but what is the particular discovery for which each of the patents was granted; or, as was said in the opinion of the court of appeals for the Second circuit in *Ecaubert v. Appleton*, 35 U. S. App. 221, 15 C. C. A. 73, and 67 Fed. 917, "it was necessary for the court to know the point

from which each inventor started, and thus to know in what the invention consisted." The circumstance that, as in the present case, the claims of the two patents are in identical language, does not settle the question of the identity of the invention covered by those claims. The construction of the claims may be affected by the specifications, respectively, and they are also subject to modification of construction by the course of proceedings in the patent office. There have been several decisions in the circuit courts involving the subject of jurisdiction in such cases. In *Foster v. Lindsay*, 3 Dill. 126, Fed. Cas. No. 4,976, the defendant set up, as one of his defenses, that the invention claimed in the patent of the complainant had been anticipated and was in use before either of the interfering patents had been applied for. It was objected that this defense could not be entertained, and that the court could only determine the question of priority in making the invention. But the court (Treat, J.) held that it was competent in such a case to declare either or both patents void, and so put an end to the litigation. A few years later the question of the power of the court in such cases was presented in the circuit court for the Eastern district of New York, before Judge Benedict, in *Pentlarge v. Pentlarge*, 19 Fed. 817, where a different view was taken, and it was there held that the statute contemplated that only the questions of interference and priority should be open for adjudication. The reasons which induced the dissent from Judge Treat's construction are stated to be these:

"If the defendant in such an action may attack the plaintiff's invention upon any grounds which the statute permits to be set up by answer in an action for infringement, it would then result that the proceeding would fail to secure an adjudication of the question of interference, and so the proceeding be rendered futile for the purpose which the statute intended should be accomplished."

This proposition assumes that the attack upon the plaintiff's invention succeeds, and the apprehension is that for such a reason the question of interference would not be reached, and so that the purpose of the statute would not be accomplished. But if it is once found that the plaintiff has made no invention, what practical purpose is to be accomplished by taking up and determining a question of priority? Can it be supposed that congress intended that the case should nevertheless be carried on for a vain purpose?

Again it is said:

"By this plea the defendant admits the averment of the bill that the plaintiff's patent is for the same invention as that described in the defendant's patent, and also that the plaintiff was the first inventor. Upon these facts, according to the statute, the plaintiff should have a decree declaring the defendant's patent void, and yet, if the plea be allowed, the plaintiff will obtain no adjudication upon this question, while the defendant will obtain a decree declaring the plaintiff's patent void, and leaving his own to stand; and this, too, when the facts stated in his plea, if true, stated in connection with the facts stated in the bill which are admitted, show the defendant's patent to be also void. The defendant, then, by his plea and his admission taken together, shows his own patent void, and upon that showing claims a decree declaring the plaintiff's patent void, and leaving his own unaffected."

The plea referred to by the learned judge not only admitted that the inventions were the same, and that the plaintiff was the first in-

ventor, but it also set up that for certain reasons therein stated the plaintiff's patent was void; and surely, if the facts were as pleaded, that ought to be an end of the matter, and the plaintiff should not "have a decree declaring the defendant's patent void," and should "obtain no adjudication upon the question of his priority." The purpose of the statute would not be disappointed, for there is no purpose to have a vain proceeding. Nor can there be any greater objection to the defendant's obtaining a decree declaring the plaintiff's patent void, and leaving his own "to stand," than there is to a decree, upon such facts, that the defendant's patent is void, and leaving the plaintiff's to stand. There was the further suggestion that the defendant showed his own patent void, and upon that showing claimed a decree declaring the plaintiff's patent void, and leaving his own unaffected. Such a result, it was said, cannot be permitted. But that was not at all the result that would follow from Judge Treat's construction of the statute, for in the case supposed that construction would lead to a decree annulling both patents. In the result, Judge Benedict held that the fact that the invention was not new was immaterial in such an action. To prevent any misunderstanding, we think it proper to say, as will appear in the sequel, that we think a somewhat different decree would have been the logical result of Judge Treat's view of the power conferred by the statute, from that which appears to have been actually rendered by him in *Foster v. Lindsay*. In *Lockwood v. Cleveland*, 20 Fed. 164, Judge Nixon expressed a similar opinion to that of Judge Benedict in *Pentlargo v. Pentlargo*. It is to be observed, however, that in neither of those cases was it necessary to decide the question, as in each of them the court reached its conclusion upon other grounds. But the opinions of the judges in these cases upon this point have been followed in other cases. See *Sawyer v. Massey*, 25 Fed. 144; *American Clay-Bird Co. v. Ligowski Clay-Pigeon Co.*, 31 Fed. 466; *Electric Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602. In the first and second of these last-mentioned cases the question was not discussed, or the reasons considered, but in the latter case the question is canvassed somewhat. The learned judge quoted Judge Benedict's opinion approvingly, and, applying the statute as construed in that and the other cases above cited to the case in hand, held that the question of duration of either patent involved in the case by reason of the existence of a foreign patent, inasmuch as it would involve a question of the identity of the two, was beyond the power of the court. With the utmost deference, we are compelled to say that, for the reasons above stated, the grounds upon which the opinion in *Pentlargo v. Pentlargo* proceeded are not so satisfactory to us, and we are unable to adopt the conclusion reached. It appears to us that section 4918 necessarily involves the presence of a patentable invention as the subject-matter of the litigation, and that the court cannot close the door to all inquiry as to whether such subject-matter for controversy exists. The court is, by the terms of the statute, empowered, as the sequel to its inquiry, to determine either of the patents void in whole or in part. Upon the principles of estoppel by judgment, such decree can bind only parties to the suit, and there is an express provision of the statute which limits its operation to those parties. But the decree does undoubtedly bind

conclusively all who are brought in and made parties, and who claim any right or interest in the invention. As to them the decree is final, and it would seem anomalous that the court should pronounce as between such parties a final decree of invalidity upon grounds less narrow than those which upon general principles the court is bound to regard in order to reach a just conclusion. It seems manifest that the decree is intended to be final. If anything less were intended, it is reasonable to suppose that appropriate language would have been employed to express the limitation; but the terms employed are general, and import no qualified effect in the decree which the court is empowered to render. The parties are not left to relitigate their controversy upon other grounds. The inquiry should be as broad as the conclusion. Quite pertinent to such an inquiry would be previous patents to the same inventors for inventions in the line of the art involved, for they will help to illustrate and define the invention or inventions now involved. It appears from the evidence in the record that Palmer and Huss had each of them obtained several patents for other inventions relating to the same general subject; that is to say, to the use in the manufacture of pneumatic tires of rubber fabric, wherein the rubber is reinforced by threads or other material. We say the same general subject, for beyond doubt the subject-matter of these patents had been of peculiar, if not of exclusive, interest to the parties concerned, as well as the public, in its relation to that manufacture.

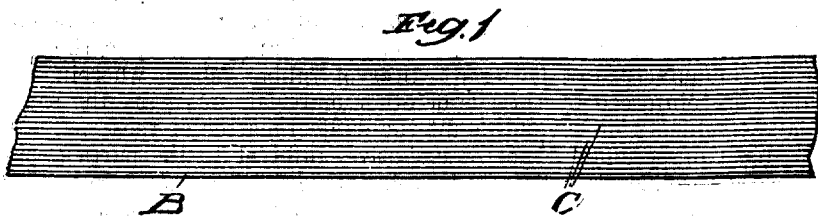
We will therefore proceed to ascertain what was the scope and character of the invention covered by the respective patents in question. Palmer, upon whose invention the complainant relies, had been for some time interested in the manufacture of tires for bicycles. The evidence tends to show that he first conceived the idea of the fabric which is the subject of the complainant's patent in July, 1892, or possibly a little earlier. We do not undertake to fix the precise date. On the 9th day of August following, he made application for a patent for a pneumatic tire, in which should be employed, for the purpose of reinforcing and strengthening the tread of the tire, the fabric in question. Some of his claims were for the tire, some for the fabric, and some for the method or process of making it. On November 31, 1892, he dropped by disclaimer from this application the fabric, and the method of making it in other forms than when used for making tubes; reciting that in another application, filed November 17, 1892, he had applied for a patent for the fabric and the method of making it. His original application was allowed, and letters patent No. 489,714 were issued to him, January 10, 1893. The patent stated his invention to be of "a new and useful improvement in bicycle and other tubing," and that it related to an improvement in the manufacture of tubing, "and more particularly in the form of pneumatic tires for bicycles." He stated it as an object of his invention "to provide a fabric for use as a reinforcing strip for tubing of this nature," which should produce certain described advantages. Then, after pointing out the defects of former constructions, and referring to his own former patent, No. 476,680, in which was provided a device for remedying these defects somewhat by the employment of diagonally cut strips of canvas, he stated that it was an object to entirely overcome the objections to that fabric by substi-

tuting substantially the nonextensible fabric, the making of which he describes as follows:

"To make the substantially nonextensible strip, the employment of which is here suggested, I proceed as follows: While calendering the rubber in the usual calendering rolls, threads are fed to the sheet in the direction of its movement through the calendering machine; these threads being close together, but in the main, at least, out of contact with each other, and becoming imbedded in the soft rubber as the sheet is formed. When the sheet is vulcanized these threads become securely embodied therein, and substantially prevent longitudinal stretching of the sheet, although lateral stretching is still possible. This sheet is then cut into strips longitudinally of the threads therein, or, in other words, the strips are so cut that each will have imbedded in it threads extending longitudinally thereof."

In making the tire he directs that the strips be wound spirally around the inner tube in opposite directions.

With the specification are three drawings, the first of which is the new fabric he proposes to use. It is here shown:



Referring to the drawings, he says:

"In the drawings, Fig. 1 is a plan view of a strip of rubber having imbedded therein longitudinal parallel threads in accordance with my invention; Fig. 2 is a perspective view of a section of rubber tube wound spirally, with superimposed strips of rubber carrying longitudinal parallel threads; and Fig. 3 is a perspective view of a mandrel, to which is applied a collapsed soft-rubber endless tubing, preparatory to vulcanization. A represents a tube made of rubber; B a rubber strip having imbedded therein longitudinal parallel fibrous threads; C, preferably of linen or similar material of a character to be substantially nonstretching. In applying two such strips wound in opposite directions spirally upon the tube, A, it is preferred to wind them as illustrated in Fig. 2, and to lap and join the edges by cementation or otherwise, as indicated at D in Fig. 2. It will be observed that lateral or transverse stretching of the envelope of the tube is prevented by the substantially straight direction of the strain upon the fibrous thread, while longitudinal stretching is still permitted."

The peculiarly valuable quality of his new fabric, which is nonextensible in one direction, but extensible in the other, is that, whereas, if the threads of the fibrous material are woven, as in canvas, the friction of one upon another at their points of contact rapidly saws them into fragments when put into any use which constantly varies the strain at different points, as in the tire of a bicycle when in use, the holding of the threads apart by firmly imbedding them separately in the vulcanized rubber shields them from such destruction, and renders the fabric much more durable.

Later on, the patentee inserted the disclaimer before referred to, as follows:

"I do not herein lay specific claim to the fabric, or the method of producing the same, in other forms than such as are necessary for its use in connection

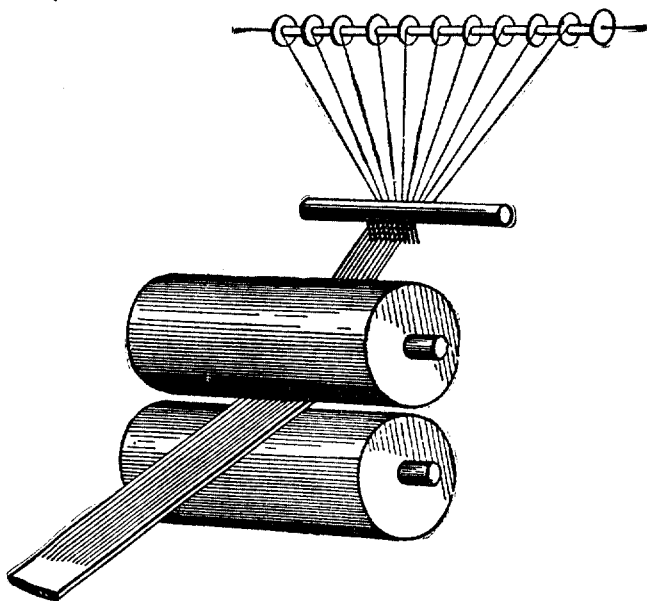
with tubing, as hereinbefore described; but in another pending application (Serial No. 452,339, filed November 17, 1892) I have applied for a patent for the fabric generally, and the method of producing the same."

Claim 1 in this patent, in the original application, is as follows:

"(1) As a new article of manufacture, a rubber tube for pneumatic and similar purposes, having spirally wound thereon, and imbedded and held therein by vulcanization, fibrous threads of a substantially nonstretching character, substantially parallel with, but out of contact with, each other, substantially as described."

Several other claims for rubber or similar tubing follow, all of which require as a constituent the peculiar fabric of parallel threads imbedded in rubber or like substance.

It is manifest from this examination of the patent that the essential feature of the invention was the devising of the new fabric shown in Fig. 1 of the drawings, and making it a constituent part of his "bicycle and other tubing." Indeed, the tubing would not have been patentable at all without it, for it would have been nothing more, by his own confession, than had already been patented. Conceiving, subsequently to the filing of his application, that this peculiar fabric might be useful for other purposes, he attempted to cut it out of his original application, and put that and the method of forming it forward as the subject of a further patent. The specification for this further patent contained substantially the same description as that contained in his original application, and was of a fabric formed by passing a sheet of rubber, on which were laid longitudinally parallel threads out of contact with each other, through calendering rolls, whereby the threads are pressed into the rubber and the latter vulcanized. The process is described, and the product is readily inferable therefrom. Both process and product are shown by the one drawing, which is attached to the specification, and is here shown:



The first three claims, which are the only ones material to be noticed here, are these:

"(1) A fabric made of elastic and impervious material, such as rubber, having imbedded within the surface threads substantially out of contact with each other, as described. (2) A fabric made of elastic and impervious material, having imbedded and vulcanized therein substantially parallel fibrous threads, as described. (3) A fabric made of vulcanized elastic and impervious material, having imbedded and vulcanized therein substantially parallel fibrous and nonextensible threads, as described."

Confessedly, they are for the same fabric as was described and claimed in claim 1, and other claims, as a constituent member of his pneumatic tire, in patent No. 489,714. If this subsequent patent is valid, the public cannot use the invention of patent No. 489,714, which includes the fabric of the later patent, after the term of the former expires, until the term of the patent for the fabric expires.

Certain things transpired in the patent office during the progress of the case upon the last application which should be here noted. Upon the filing thereof all the claims in the application were rejected, upon reference to patents to Mayall, Crane, and Jones, respectively. Upon reconsideration and argument they were again rejected. Thereupon Palmer appealed to the board of examiners in chief. A carefully prepared argument was submitted by his solicitors to the board, in which they sought to avoid the references to the Crane and Jones patents, upon distinctions not now material. Their contention upon the Mayall reference was based upon the ground (and that was the only ground on which they attempted to avoid it) that in the Mayall patent the fabric was made by laying the threads upon a sheet of rubber, longitudinally thereof and parallel with each other, then coating the threads with plastic rubber so that they should be thoroughly saturated and covered, and then, when nearly dry, pressing all these materials compactly together, whereas in the Palmer application the fabric was made by pressing with great force, such as that of calendering rolls, the parallel threads into the substance of the rubber sheet, and by concurrent vulcanization completely imbedding the threads in the substance of the sheet of rubber. This, it was urged, made a clear distinction between the two products, and entitled Palmer to a patent. The board accepted this construction of Palmer's application, and, as its opinion found in the file wrapper shows, upon that ground the ruling of the examiner was reversed, and the patent allowed. Whether the construction put upon the Mayall patent was in all respects correct or not is immaterial to the effect of allowing the Palmer patent upon the footing of these proceedings, and the construction thus imposed.

Turning next to the history of the Huss invention, it is found that, as contended by the appellees and determined by the court below, Huss invented the fabric in question in March or early in April, 1892, and prior to the invention of the fabric by Palmer. The facts upon which this priority is claimed to be established are thus stated by counsel for the appellees:

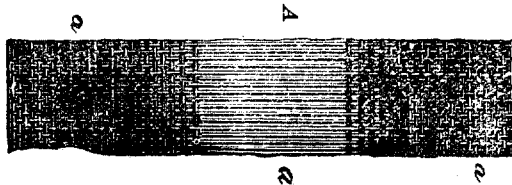
"The beginning of April, 1892, Huss had a lot of this fabric manufactured in the factory of the Chicago Rubber Works, at Chicago, Ill., in his presence and according to his instructions. It was made at that time by August J. Hermann, who was then a workman employed by the Chicago Rubber Works,

and who worked entirely under the directions of Huss in making this fabric. He used a revolving metal tube, about twenty-five feet in length and three and one-half inches in diameter, as a straight mandrel, around which he wound one layer of linen thread, with the convolutions of the thread close together, without crossing each other. He covered this layer of thread with two coats of rubber solution, so that the rubber solution filled the spaces between the convolutions of the thread, and penetrated the thread in some places, and formed an even surface of the solution over the entire layer of thread, on the outside thereof. He allowed the rubber solution to dry to a sufficient extent, and then entirely covered the layer of thread with a thin sheet of unvulcanized rubber, which he rolled down with an iron roller, using all of his muscular power for that purpose. He then cut the material thus made across the convolutions of the thread, or lengthwise of the metal tube or mandrel, and removed it from the metal tube or mandrel, and thereby produced a large sheet of fabric, consisting of a thin sheet of unvulcanized rubber, having parallel threads imbedded in its surface, and substantially out of contact with each other."

No application was then—nor until a year and four months later—made by Huss for a patent on his fabric as a separate invention. But meantime, on August 8, 1892, he filed his application for a patent on a pneumatic tire, and on October 11, 1892, still another application for a patent on a pneumatic tire. Patents on each of these applications were issued on the same day, April 25, 1893, and were numbered 495,974 and 495,975, respectively. In the first of these applications he stated his invention to be an improvement in pneumatic tires, consisting in the reinforcement of the tread of the tire by arranging transverse threads in that portion of the structure. The object was to make the tire inelastic sidewise of the tread, but elastic longitudinally. Another advantage consisted in the parallelism of the threads, whereby they were saved from the "sawing action and wear" incident to the employment of a woven fabric. He further states that he provides certain details of arrangement constituting matters of further improvements. After explaining the drawings, he says:

"In the construction of tire shown, the fabric is united with the outer rubber tube or cover, B, and the air tube, C, is arranged within the tubular layer of canvas or fabric. But I do not confine myself to such precise arrangement or mode of incorporating the fabric, A, in a pneumatic tire, and I may also apply the same to any known or suitable construction of tire; observing, however, that in so applying the fabric I arrange its portion, a', from which the longitudinal or warp threads are omitted, so as to re-enforce the tread portion of the tire."

Fig. 4, here shown, illustrates this fabric.



Further on, he says:

"And I may also embody and incorporate such re-enforcing fabric or arrangement of threads within or apply the same to a layer of unvulcanized rubber and then vulcanize the same as will be readily understood by those skilled in the art, without further description."

Claim 3 was as follows:

"(3) A pneumatic tire comprising a re-enforcing fabric united with a layer of rubber, and having its longitudinal or warp threads omitted along the tread portion of the tire, substantially as described."

In the application upon which No. 495,975 was issued, Huss states that his invention was of "a certain new and useful improvement in pneumatic tires." After stating his objects, he says:

"In a tire characterized by my invention, its tread or tread portion is reinforced or supplemented by a layer or layers of threads or thread portions arranged transversely with relation to the tread, and applied or incorporated within the tire in any desired or suitable way consistent with or appropriate to the construction of tire employed."

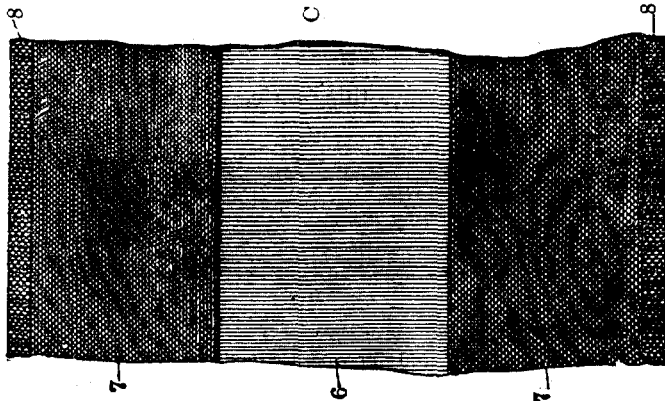
And further:

"My invention also contemplates, as matters of further improvement, certain details of construction and arrangement, and special modes of preparing and incorporating the re-enforcing layers of thread, as hereinafter fully disclosed."

Pertinent to the matter in hand, he further says in his description:

"As illustrative of a simple, convenient, and economical mode of lining the tread portion of a tire layer with a layer of transversely arranged threads or thread portions, I have shown in Fig. 14 a portion of a mandrel, M, upon which the tire sheet or tubular structure can be formed. The thread can be wound directly upon this mandrel so as to form a layer, 31, and the layer, 32, of rubber can be applied upon such thread layer, and be caused, by suitably applied pressure, to unite either with the entire layer of thread, or to unite with the same along the sides and seating portion of the structure, so that, while the thread will be imbedded therein, it will simply lie again against the inner side of the tread portion of the tube or tire sheet. This tubular sheet can be vulcanized, and then split to form a sheath, or otherwise used as will be understood by referring back to the description of preceding figures. As a special matter of improvement, however, the layer of rubber is pressed upon the layer of thread as aforesaid so as to incorporate or imbed the thread within the rubber; and by such arrangement, a sheath, such as illustrated in Fig. 4, can be produced."

Fig. 4, thus referred to, is here shown:



In further description of his invention, he says:

"Where the cross threads are imbedded in the elastic tube sheet or sheath, they are still separable, or free to separate from one another, since they are simply connected together by an elastic connection, which will stretch or yield longitudinally, but which will be held against transverse stretch by the threads which will not stretch. Hence, although the threads may separate from one another at any point during the passage of the tire over an obstruction, they will nevertheless be restored to their proper normal position by the retraction of the elastic connection, as soon as the obstruction has been passed. It will be seen, therefore, that my invention contemplates re-enforcing a tire tread by a layer of parallel threads united by elastic connection, and arranged so that, while allowing the tread to have a longitudinal stretch, they will hold the same against transverse stretch."

Of the claims in the patent on this invention are these:

"(1) A hollow pneumatic tire, re-enforced by a layer or layers of transversely arranged threads or thread portions incorporated within the tire for the purpose set forth." "(16) A pneumatic tire, having its tread re-enforced by cross threads or thread portions united by elastic connection, and separable from one another to the extent of the elastic yield or stretch of such elastic connection longitudinally with relation to the line of tread, substantially as described."

It is thus apparent that, whatever may be said of his patent No. 495,974, Huss described and claimed in the application, on which was allowed patent No. 495,975, in some of the claims thereof, an article of manufacture which necessarily involved the employment of the same fabric as that described in the patent for the fabric itself. Again, it is necessary, to the appellee's contention for priority in favor of that invention, that the fabric of his patent should have been the same as that employed in his former patent or patents, for it is upon the reduction to use in the construction of his tire that he depends for keeping his invention of the fabric alive. There is no evidence whatever of his using it for any other purpose than that of making tires. No question is made but that it is the same fabric, but counsel for the appellee say it is not an essential part of the pneumatic tire of No. 495,975, because the patentee describes two fabrics which may be employed, of which this is one, and the other is a woven fabric. But this is a mistake. Although a woven fabric is described for other portions of the tire, it was not the fabric used in the tread. If it had been, there would have been nothing patentable, for such structure had been long in use, and was of the kind on which his was an improvement. It was of the essence of the invention that the re-enforcing fibers in the tread should be parallel with each other, and should not cross each other as in woven fabrics. It is true that Huss mentions a laying of the threads transversely of the tire without incorporating them in the substance of the rubber or other elastic material. But it is evident that such a construction would not meet the requirements of the above quoted claims in patent No. 495,975. If, therefore, the Huss patent for his fabric as a separate invention can stand, the public would infringe it, if, after his tire patent shall expire, they undertake to practice the invention claimed in the tire patent, and which necessarily involves the use of his fabric. In other words, the monopoly of the first patent would be prolonged until the later patent shall expire.

We think there is no escape from the conclusion that both patents now in suit are void, and for a like reason. One cannot lawfully have two patents for one invention. When once the invention has been used as the consideration of a grant, its value for that purpose is spent, and there is nothing in it on which a second grant can be supported. And this rule holds good though the scope of the patents may be different. One cannot extract an essential element of his invention from a former patent, without which the former patent would not have been granted, and make it the subject of a subsequent patent. The case of *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310, is a signal illustration of the rule which has been settled by that and former decisions of the supreme court upon that subject. In that case one of the elements of the combination previously patented consisted of a spring adapted to be used in a cultivator for the purpose of aiding in depressing and in lifting the bar of the implement to which the teeth were attached. Subsequently he obtained another patent for the single function of the spring in aiding to lift the bar. The second patent was held void upon the ground that the matter of the invention was included in the matter of the invention for which the former patent was granted. That decision shows that it is not necessary to the rule that the patents should be for co-extensive inventions, or that the subject-matter thereof should be technically the same. The rule rests upon the broad and obvious ground that, if the second patent is for an invention that was necessary to the use of the invention first patented, it cannot be sustained. In the case of *Lock Co. v. Mosler*, 127 U. S. 354, 8 Sup. Ct. 1148, a patent had been granted, two of the claims of which were for an article produced by a certain described process. Later, the patentee procured a patent for the process as a distinct invention. The second patent was held void. Mr. Justice Blatchford, delivering the opinion of the court, said:

"After a patent is granted for an article described as made by causing it to pass through a certain method of operation to produce it, as, in this case, cutting away the metal in a certain manner, and then bending what is left in a certain manner, the inventor cannot afterwards, on an independent application, secure a patent for the method or process of cutting away the metal, and then bending it so as to produce the identical article covered by the previous patent, which article was described in that patent as produced by the method or process sought to be covered by taking out the second patent."

In *Plummer v. Sargent*, 120 U. S. 442, 7 Sup. Ct. 640, it was held that an invention of an article of manufacture which could only be made in one way, and the invention of the process by which the article was made, were one and the same, and not distinct inventions.

Undoubtedly, as pointed out in *Miller v. Manufacturing Co.*, *supra*, if the second patent is for a distinct and separate invention, or, to put the matter in another way, has not been made integral with another invention already patented, so as to be fairly necessary to its use, it should be sustained, if the other requisite conditions exist. Such was the case in *Ohio Brass Co. v. Thomson-Houston Electric Co.*, 54 U. S. App. 1, 26 C. C. A. 107, and 80 Fed. 712, where the second patent, being for an improvement upon the subject of a prior patent to the same patentee, was held valid. Judge Taft, in delivering the opinion

of this court in that case, clearly pointed out the distinction between such a case and that of *Miller v. Manufacturing Co.*, and it was upon that distinction that the decision was founded. There the original invention could be practiced without the use of the improvement. It continued without any improvement therefrom, and had no claim whatever to its advantages. It is evident that the patents involved in the present case fall within the rule of the cases of *Lock Co. v. Mosler* and *Miller v. Manufacturing Co.*, and not that of *Ohio Brass Co. v. Thomson-Houston Electric Co.*

It is unimportant that Huss invented his fabric before he applied for his earlier patents above referred to, or even if he invented the fabric before he invented his pneumatic tire, for the only dates material to the question are those of the patents themselves. *Suffolk Co. v. Hayden*, 3 Wall. 315; *Miller v. Manufacturing Co.*, *supra*. Nor did the attempt by Palmer to reserve the fabric from his tire patent by disclaimer, for the purpose of taking out a separate patent on that, avail, for it was a necessary and inevitable legal consequence that the first patent should absorb the invention of the fabric. This feature of the case was also present in *Miller v. Manufacturing Co.*, and it was there held that the reservation was ineffective. Specific allegations in the pleadings of the facts we have referred to were not necessary. They were competent and admissible to prove what the inventions covered by the patents were,—a question which was vital to the issue as to whose discovery was first. Whether, therefore, the effect of the narrowing of the Palmer fabric patent to a fabric in which the fiber is imbedded in the substance of the rubber, and vulcanized therein, and so could be distinguished from a fabric in which the threads are held in contact with the rubber substantially by means of a coating of more plastic rubber, subsequently made adherent to the sheet by pressure, such as counsel for the appellant contend the appellee's product is, would distinguish the inventions, if valid, we do not find it necessary to determine. It may well be that if the case were such as that, upon such evidence as the court has before it relevant to the nature of the invention, the court should think there was fair doubt about its patentability, and that upon a wide range of evidence it might be sustained, the court would proceed to decide the question of priority, and settle the rights of the parties so far as they might depend upon that question. But that is not the case here. We are of opinion that the decree should be reversed, and the cause remanded, with direction to dismiss the bill and deny the relief prayed for by the answer, for the reason that the court finds that the respective patents alleged in the bill to be interfering patents are void in respect to the claims in controversy, for lack of invention; and it is so ordered.

THE THOMAS A. SCOTT.¹

(District Court, D. New York. July 16, 1864.)

1. JURISDICTION—NATIONAL VESSEL—SALVAGE.

Where a libel was filed to recover compensation for salvage services rendered to a vessel, which, though not commissioned in the navy of the United States, was owned, manned, supplied, and armed by the United States, and used in the transport service, *held*, that the judicial tribunals of a country cannot entertain suits in which the sovereign power of that country is sought to be made a party respondent.

2. SAME.

Held, also, that the property of a state or nation cannot, as a general rule, be proceeded against in its courts.

3. SAME.

Held, also, that the court has no jurisdiction over the vessel in question, although she is merely a transport.

The libel in this case was filed by Charles Hargitt, master of the British steamer *Labuan*, on behalf of himself and the owners and crew of the vessel, against the propeller *Thomas A. Scott*, in rem, to recover salvage for services rendered to her on the 14th April, 1864.

The *Labuan* was bound from New York to Liverpool, but by stress of weather was compelled to put back to New York. On the way back, when about eight miles east of Barnegat light, she fell in with the *Thomas A. Scott*, bound from New Orleans to New York, in distress, having lost her rudder and propeller, and being out of provisions. The *Labuan* went down to her, and took her in tow; and towed her for about 18 hours, till she was taken in tow by a steam tug, about four miles below Sandy Hook, and brought into port. The propeller was valued at \$200,000, and the libellant prayed for an award of salvage to the amount of \$20,000. Process was issued against the vessel, and thereupon the district attorney of the United States appeared in the suit, and filed a claim on the part of the United States, and interposed a plea to the jurisdiction of the court. The plea alleged that the *Thomas A. Scott* belonged to the United States, and was in their exclusive possession; that she was bought by the war department of the United States, and paid for out of the appropriation for the support of the army; that she was not commissioned in the navy, but belonged to a class of vessels owned, manned, supplied, and armed by the United States, and employed for purposes connected with the operations of the army; that the *Scott* was, at the time she was fallen in with, returning from New Orleans, whither she had carried a load of powder, shot, and shell, for the use of the army, and that she had been, while owned by the United States, employed in transporting troops, commissary, quartermaster, and ordnance supplies; that she was armed with two 32-pound brass guns, and one 30-pound Parrott gun, and was a public armed vessel of the United States. Therefore the plea denied the jurisdiction of the court.

Da Costa & Marvin, for libellant.

Andrews, Asst. Dist. Atty., for respondents.

¹ The above-entitled case is referred to in the Federal Cases (Case No. 13,920) as "Nowhere reported." We now learn, through the courtesy of Arthur H. Russell, Esq., of the Boston bar, that this case was reported by R. D. Benedict, Esq., and published in 10 Law Times, New Series, p. 723, and this report of that case is herewith reprinted for the purpose of supplying in the Federal Reporter every case which has been inadvertently omitted from the Federal Cases.

SHIPMAN, District Judge. It is a well-known rule of law that the judicial tribunals of a country cannot entertain suits in which the sovereign power of that country is sought to be made a party respondent. Neither can the property of the state or nation, as a general rule, be proceeded against in its courts. In conformity with this rule, it was held in the court of admiralty in England, in 1816, in the case of *The Comus*, cited on the discussion in the case of *The Prins Frederik*, 2 Dod. 464, that a libel for salvage would not lie against public armed ships of that nation. After a somewhat diligent search, no case has been found where a public armed vessel, or any other public property, the title and possession of which was exclusively vested in the sovereign, has been held amenable to judicial process, unless, indeed, cases of prize may be said to partake of such a character. It has, indeed, been held that, in cases of general average, the masters or owners may retain all goods in their possession until their share of the contribution is either paid or secured. *U. S. v. Wilder*, 3 Sumn. 308, Fed. Cas. No. 16,694. The discussion, in the opinion of this case delivered by Story, J., takes a wide range, and it is perhaps inferable from parts of it that in cases of the salvage of private ships the goods of the United States on board should be held equally subject to the admiralty process in rem for their proportion of the salvage due. But I do not understand the point decided to go beyond the case of general average, where goods of the government form part of the cargo on board of a private vessel. Still, it must be admitted that a case of salvage of a private ship, where part of the cargo belonged to the sovereign power, could not be very well distinguished from the one decided by Judge Story. In cases of general average and salvage, the masters or owners have a lien on the res salvaged; but the learned judge, in the case just cited, remarks that "in such cases the nature and use of the articles, as the means of military and naval operations, may repel any notion of any lien whatever grounded on the obvious intention of the parties." These remarks were made with reference to arms, artillery, camp equipage, and such like materials of war belonging to the government as might be shipped with other cargo of a merely private nature, for transportation in a private ship. This court is informed that the government has invariably acquiesced in the rule laid down in the case of *U. S. v. Wilder*, by paying general average on its own goods shipped as a part of the cargo of private vessels. Whether this acquiescence has extended to military stores in time of war, and designed for use in active military operations, the court has no means of determining. Certainly the argument *ab inconvenienti* against the sovereign power submitting its military materials designed for active hostilities to the unavoidable delays of judicial tribunals is very formidable. This argument applies with as much force to the case of judicial proceedings against transport ships as to their cargoes, consisting of supplies and munitions of war. Indeed, both the transport ship and cargo would often be involved in the delay consequent upon any proceeding in the court against either. A number of cases have been cited on the argument by the counsel for the libellant in support of the jurisdiction of the court, which I will now notice. The first is the case of *The Betsey*, 1 Marr. 80. This case

was determined by the English court of admiralty in 1777, and related to the recapture, by one of the king's ships, of a vessel which had fallen into the hands of the Americans. The navy board contended that the demand of the officers of the king's ship of one-eighth salvage was not within the act of parliament, as that extended only to ships and goods of his majesty's subjects retaken from the enemy. But the court held that of common right salvage is always due for recapture, and therefore it would be illiberal to construe the act of parliament narrowly. The case is not very fully reported, but I infer from it that, prior to the prize acts of parliament, it had been, under some form of proceeding, customary for the admiralty courts to decree salvage to the naval officers of the king's ships instrumental in the recapture of vessels taken by the enemy, and that the custom in 1777 was expressly recognized and implicitly sanctioned by acts of parliament then in force. The next case cited was that of *The Marquis of Huntley*, decided in 1835, and reported in 3 Hagg. Adm. 246, chartered by the government and having government naval and ordnance stores, together with a lieutenant and several invalid soldiers, on board. On her voyage from Leith to London she got onto the Middle Hand, off Essex, where she experienced very bad weather, and finally was relieved from very great peril by several private vessels. An action for salvage was entered against the ship, cargo, and freight, and an appearance entered, and bail given, for the ship and freight only. When the case was ready for hearing, the court, having ascertained that no salvage had been paid on the stores, nor any account furnished of their value, expressed its opinion that in a case of such great merit, and where three lives had been lost, there ought to be a remuneration in respect to the stores, and directed the case to stand over, that the matter might be represented to the admiralty. This was done. The king's advocate appeared, and after stating the value of the stores, and that the government was anxious that the salvors should be rewarded liberally, left the amount of that reward to the judgment of the court. The case then proceeded. The case of *The Athol*, 1 W. Rob. Adm. 374, decided by Dr. Lushington in 1842, was instituted for damages caused by a collision. The facts were these: A brig was run down in the Channel by her majesty's troop ship *Athol*, and was totally lost. A memorial having been presented to the lords of the admiralty praying compensation, or otherwise that the admiralty proctor might be instructed to appear to answer to a suit to be commenced in the court, a letter was addressed to the proctor and owners of the lost brig by the secretary of the admiralty, stating that the lords commissioners declined to interfere. A motion was then made before Dr. Lushington for a monition against the lords of the admiralty, calling upon them to show cause why the damage should not be pronounced for, and compensation awarded to, the owners of the ship and cargo, and to the master and crew for the loss of their effects. The judge declined to grant the motion, for the very good reason that he had no power to enforce an appearance or the payment of damages as against them. In the course of his opinion he says: "In cases of king's ships, loaded with cargo or treasure, salvage has been awarded; but no case has occurred within my recollection

in which the crown alone was concerned." The motion having been refused, on application by the proctor for the Athol the court directed that a communication should be made by the registrar to the lords of the admiralty, stating that the motion for a monition had been made to the court, and the lords of the admiralty subsequently directed that an appearance should be given by the admiralty proctor for the Athol, in order that the court might adjudicate upon the question. Two other cases were cited on the argument,—that of *The Swallow* and *The Inflexible*, both her majesty's ships (1 Swab. 30, 32). These, however, were suits against the commanders of these vessels, and not in rem against the ships. It was sought only to subject the officers personally, though the lords of the admiralty, in one case at least, directed an appearance in behalf of the officer. In none of the cases referred to, all of which I have noticed, has the English court attempted to deal adversely with the public property of the sovereign, except where there has been a voluntary appearance on its behalf, and a submission of the case to the judgment of the court, unless it be the case of *The Betsy*, in which I think the action of the court must have rested upon some act of parliament. It is unnecessary to remark that there is no act of congress conferring special jurisdiction upon our courts in cases like the present. On the whole, therefore, I conclude that the court has no jurisdiction over the *Thomas A. Scott*, even assuming her to be merely a transport. She is exclusively owned by the sovereign power, and therefore is not amenable to the judicial tribunals at the suit of private parties. The libel must, therefore, be dismissed as the cause now stands. But, inasmuch as the government may be desirous of making compensation to the salvors in case they are able to prove a meritorious claim for salvage, I will withhold the decree for the present, until the attorney can advise with the proper department, and take its direction in the matter.

THE VIOLA.

FORSYTH v. STETSON et al.

(District Court, D. Massachusetts. December 6, 1898.)

No. 898.

1. SHIPPING—DEMURRAGE—DELAY IN DISCHARGE OF CARGO.

While, in the absence of qualifying circumstances, it is usual and customary at the port of Boston for a consignee to have a berth provided at which a vessel may discharge her cargo within 24 hours after her arrival, by the custom of the port the presence at the designated wharf of other vessels, which arrived earlier, is considered such qualifying circumstance, and in such case vessels are required to wait their turn to discharge without demurrage for the delay so caused. *Held*, that such custom was a reasonable one within reasonable limits, and under ordinary circumstances, and that a vessel loaded with lumber was not entitled to demurrage because of a delay of 15 days, caused by so waiting her turn to discharge, it not appearing that the wharf was too small for the ordinary business of the owner, nor that he willfully or negligently permitted a large number of vessels to collect for discharging at the same time.

2. SAME—REQUIRING DISCHARGE AT WHARF OF VENDEE.

Where a bill of lading for a cargo requires its delivery to the consignee "or assigns," the master knows that the wharf of discharge may not have been selected; and the fact that the consignee sells the cargo before its arrival, and designates the wharf of the buyer as the place for its discharge, does not change the rule as to demurrage for delay in being provided a place to discharge.

This was a libel in admiralty for demurrage for delay caused by a failure to provide a place for discharging a cargo consigned to respondents.

Carver & Blodgett, for libellant.

Homer Albers and A. H. Russell, for respondents.

LOWELL, District Judge. The respondents were wholesale dealers in lumber, having offices in St. John, N. B., in Boston, and in other places. They had no wharf in Boston. A cargo of lumber was shipped by them on board the libellant's schooner *Viola* from St. John to Boston. The bill of lading was dated July 5, 1897, and read as follows:

"Shipped in good order, and well conditioned, by Stetson, Cutler & Co., on board the Br. Sch'r called the *Viola*, whereof Forsyth is master, and bound for Boston, Mass., to say:

		Freight Per M.	
1,968 feet spruce boards	at.....	\$2.12½	Under Deck.
143,880 feet spruce scantling	at.....	2.12½	Under Deck.
50,024 feet spruce plank	at.....	2.12½	Under Deck.

—Being marked and numbered as in the margin; and are to be delivered in the like good order and condition at the port of Boston (the act of God, the queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind, excepted), unto Stetson, Cutler & Co., or assigns, he or they paying freight as above. All on board to be delivered."

There was no written charter party. The *Viola* arrived in Boston July 12th, and was at once reported by her captain to the respond-

ents. They had already sold her cargo to the Curtis & Pope Lumber Company, to whose wharf they at once ordered the vessel. Owing to the weather, she did not reach there until the morning of July 14th, and then she found there several vessels waiting their turn to discharge. Her own turn did not arrive until July 29th. Thereafter she was discharged with reasonable dispatch. The captain protested against the delay, and claimed demurrage, sending daily bills therefor to the respondents on and after July 22d.

The libelant testified that Beatey, the respondent's agent in St. John, with whom the contract of shipment was made, expressly contracted that the *Viola* should be discharged without delay. This Beatey denied, and, upon the whole, the evidence failed to convince me that any special agreement was made concerning the schooner's discharge.

At the trial, the parties agreed in writing that 24 hours, in the absence of any qualifying circumstances, is a usual and customary time to have a berth provided by the consignee. The respondents contend that the presence at the designated wharf of vessels which have arrived there earlier than the vessel in question is a qualifying circumstance, and they allege a custom of the port of Boston which requires vessels to wait their turn at the wharf without demurrage for the delay so caused. In the case of *Bellatty v. Curtis*, 41 Fed. 479 (decided in this district by Judge Nelson), the master of a schooner arriving in Boston with a cargo of lumber consigned to the defendants, and kept waiting his turn at their wharf for a fortnight or more, was denied demurrage. The bill of lading was substantially like that in the case at bar. In his opinion Judge Nelson said that the vessel was discharged in the usual way, and within a period sanctioned by the usage of the port. This case I do not feel disposed to overrule. The decision of a competent court, sitting in a given locality, that a local custom exists, is more than evidence of the custom. If unchallenged for a number of years, it not only declares, but confirms, the custom, and should not be lightly reversed. The testimony concerning the custom given by the witnesses in this case is, of itself, not altogether conclusive. On the whole, it comes to this: That, in the absence of express agreement, a master does not expect or claim a berth for discharge within 24 hours of his reported arrival, if there are vessels ahead of him; but, on the other hand, if he is kept waiting his turn a long time, he usually does complain, and occasionally is paid something for the delay. Even in the case at bar the master made no claim for demurrage until July 22d. The evidence indicates clearly that the presence of vessels discharging at a wharf, or waiting their turn to discharge, is deemed by all parties to be a "qualifying circumstance," and the only difference of opinion concerns the extent of the qualification. Evidence like this certainly does not outweigh Judge Nelson's decision.

The libelant contends that the custom declared in *Bellatty v. Curtis* is confined to those cases in which the vessel is discharged at the wharf of the consignee, and does not apply if the consignee, having no wharf, and having sold the cargo, sends the vessel for discharge to the wharf of his vendee. There is nothing in the testimony of the witnesses in this case, either those of the libelant or those of the respondents, to suggest that

the custom differs in the two cases supposed. The witnesses either assert that the custom exists in both cases, or deny that it exists altogether. Where the words "or assigns" is found in the bill of lading, the master understands that the wharf of discharge may not yet have been selected (*Smith v. Lee*, 13 C. C. A. 506, 66 Fed. 344), and there seems no reason why his rights at the wharf of the assignee, to which he is bound to proceed, should differ from his rights at the wharf of his consignee. The hardships complained of by the libellant, which may be real, are substantially the same in one case as in the other. That a custom like the one contended for in this case is not unreasonable seems to be implied in the opinions rendered in the following cases: *The J. E. Owen*, 54 Fed. 185, 187; *Cross v. Beard*, 26 N. Y. 85; *Keen v. Audenried*, 5 Ben. 535, 536, Fed. Cas. No. 7,639; *Wordin v. Bemis*, 32 Conn. 268, 277. Probably the custom is not wholly without limitations. If a consignee willfully or negligently collects at his wharf at one time a large fleet of vessels, if his wharf is too small for his ordinary business, if it is so disposed that he habitually keeps waiting for a long time vessels consigned to him, he can hardly plead successfully a custom of vessels to wait their turn as a defense to an action for demurrage. A consignee may be liable if such is the condition of his vendee's wharf to which he has directed the vessel consigned to him. This is the answer to the extreme cases put by the libellant's counsel in examination and in argument. I do not think that there has been shown in this case such a condition of affairs at the wharf of the *Curtis & Pope Lumber Company*. I do not think that a lumber dealer is bound to time the arrivals of his cargoes so that delay in discharge will occur only in consequence of a storm. The delay to which the *Viola* was subjected extended to the limits of a reasonable custom, but, on the whole, I do not think it overpassed them.

The libellant's counsel further argues that the *Viola* was not given her turn, but was postponed in discharging to another vessel, which arrived after her. The second vessel was laden with a cargo of a different sort, and I do not think the *Viola's* cargo could have been discharged with reasonable convenience at the berth given to the smaller schooner. In *Bellatty v. Curtis*, after a part of the vessel's cargo was discharged, she was hauled out into the stream, and kept there several days, yet no demurrage was allowed. Libel dismissed, with costs.

DEFIANCE WATER CO. v. CITY OF DEFIANCE et al

(Circuit Court, N. D. Ohio, W. D. December 30, 1898.)

1. MUNICIPAL CORPORATIONS — CONTRACTS FOR IMPROVEMENT — NECESSITY OF HAVING FUNDS IN TREASURY.

Rev. St. Ohio, § 2702, prohibiting cities from making any contract involving the expenditure of money, unless the funds therefor are in the treasury, does not preclude them from making contracts for improvements not involving payment for a year and a half or more thereafter.

2. SAME—RATIFICATION BY ELECTORS—CONSTRUCTION OF STATUTES.

Act Ohio, May 4, 1885, as amended by Act May 12, 1886, authorizing cities of a certain grade to make contracts with water companies for a term not exceeding 20 years, supersedes, as to such cities, Act Jan. 29, 1885 (amending Rev. St. Ohio, § 2434), requiring contracts with water companies, the limitations whereof are not prescribed by the act, to be ratified by the electors. Therefore a 30-year contract for hydrants, at a fixed price per year, made by a city of such grade, is valid for 20 years without the ratification of the electors.

3. FEDERAL COURTS — JURISDICTION — ORDINANCE VIOLATING OBLIGATION OF CONTRACT.

The federal court sitting in equity has jurisdiction of a suit to enjoin a city from executing an ordinance providing for supplying itself with water, and thereby violating a previous contract with a private company.

On Demurrer to Complaint.

The bill of the complainant, an Ohio corporation, sets up a contract entered into with the city of Defiance in 1887 to furnish the city with 130 hydrants at \$40 each per year; that, to comply with this contract, and relying on the revenue to be derived therefrom, a large amount of bonds were issued, and a plant built; that said revenue is the only means of meeting the interest on these bonds; that on January 7, 1896, the council passed an ordinance or resolution attempting to rescind and annul the contract; that subsequently it passed ordinances looking to the construction of waterworks by the city; that after \$3,142.50 had become due under said contract, for the last half of 1897, the council colluded with the city solicitor to bring suit against themselves, and procured an injunction against their paying any money under said contract; that such action of the city, a municipal corporation, impaired the obligation of its contract with the complainant, and deprived it of its property without due process of law. The prayer of the bill was for an account, and for an injunction restraining the city and council from denying the existence of the contract, and from abrogating or attempting to annul the same, and other equitable relief. The defendants demurred to the bill on the ground that the court had no jurisdiction of the cause; that the bill contained no matter of equity; that, by complainant's own showing, it was not entitled to the relief asked; that there was an adequate remedy at law; that the court had no jurisdiction to grant the relief asked against the city and council.

Henry & Robert Newbegin, for complainant.

Harris & Cameron and Geo. T. Farrell, City Sol., for defendants.

SEVERENS, District Judge. The conclusion which I reach in this case is that the demurrer should be overruled. There are three principal questions involved in this determination, which are decided as follows:

1. Was it necessary that the city at the time of entering into the contract for water should have had in its treasury, or should have had in course of collection, the funds necessary to meet the expenditure contemplated by the contract, as provided for by the section of the Ohio statutes in that behalf (being Rev. St. § 2702)? My opinion is

that the statute did not apply to the contract in question, and that there is no objection to the contract by reason of any requirement of the statute referred to. No payment was to become due for a considerable time, a year and a half or more, and the statute does not intend that the money shall be collected and hoarded for the expenses of the city in future years.

2. Was it necessary to the validity of the said contract that it should have been ratified by a vote of the electors, as was required by the act of January 29, 1885, being section 2434 of the Revised Statutes? I think this question must be answered in the negative, my opinion being that the act of May 4, 1885, as amended by the act of May 12, 1886, relating specially to a certain grade of cities, to which the city of Defiance belongs, must be regarded as having superseded, to the extent of the cities of that grade, the general provisions of the statute of January 29, 1885. The general act prescribed no limitation in regard to the time for which such contract might be made. The special acts of May 4, 1885, and May 12, 1886, limited the time to a term not exceeding 20 years. The term for which the contract might be made being short, it may well be that the legislature should have thought so much precaution was not necessary as if the time had been for a protracted period. The contract was, in terms, for a period of 30 years; but as its stipulations are to be performed annually, and it is separable by years, I think the contract is valid for 20 years from its date. A somewhat similar question was presented to the supreme court of the United States in the case of *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, where the city relied upon the provisions of a general act which it was contended was by implication carried into the special act which gave the city power, in general terms, to provide itself with water. In my judgment, the reasons for regarding the special act referred to in that case as sufficient to carry the power without limitation from the general law were not more cogent than they are here.

3. With respect to the question of the jurisdiction of this court sitting in equity, I think there can be no reasonable doubt. The defendants are threatening to carry into effect an ordinance or resolution of the city which is manifestly designed to destroy the efficacy of the contract of August 17, 1887. The authorities upon this subject are collected, and the doctrine stated, in the above-mentioned case of *City of Walla Walla v. Walla Walla Water Co.* The demurrer will accordingly be overruled, and the defendants be allowed to answer, if they shall so elect.

BAYNE et al. v. BREWER POTTERY CO. et al.

(Circuit Court, N. D. Ohio, W. D. December 21, 1898.)

No. 1,380.

1. INSOLVENT CORPORATIONS—RIGHTS OF RECEIVER—AVOIDING CHATTEL MORTGAGE.

A receiver for the property of an insolvent corporation appointed in a suit in behalf of its general creditors succeeds to the rights of the creditors as well as of the corporation, and may avoid a chattel mortgage given

by the corporation, void as to creditors under a state statute for want of filing, though it is valid as against the corporation.

2. CHATTEL MORTGAGES—NATURE OF PROPERTY—REAL OR PERSONAL.

A mortgage securing an issue of bonds given by a corporation on its property, consisting of land, buildings, machinery, and tools used in a manufacturing business, is a real-estate mortgage as to the land and such structures, machinery, and appliances as are attached thereto, but a chattel mortgage as to such appliances and tools as are not attached, though all are fitted and adapted for use, and are used, as a part of the equipment for the same business.

This was a suit in equity by Daniel K. Bayne and others, creditors, against the Brewer Pottery Company, an insolvent corporation, and others. On distribution of the proceeds of defendants' property, sold by the receiver.

E. W. Tolerton and John K. Rohn, for Samuel B. Sneath.
Hoyt, Dustin & Kelly, for Daniel K. Bayne.

RICKS, District Judge. On the 1st day of May, 1890, the Brewer Pottery Company duly executed to Samuel B. Sneath, trustee, a mortgage to secure 60 bonds, each for the sum of \$500, payable on the 1st day of May, 1895, with interest at the rate of 6 per cent. per annum, payable semiannually on the 1st days of May and November of each year. By this mortgage the Brewer Pottery Company conveyed to Samuel B. Sneath, trustee, property described as follows:

"Situated in the city of Tiffin, county of Seneca, and state of Ohio, and known as 'Blocks thirty-five (35) and thirty-eight (38) in Second Highland addition to the city of Tiffin, Seneca county, Ohio,' containing eight (8) acres of land; together with all and singular the brick pottery plant situated thereon, and including all its engines, machinery, tools, molds, and all other personal property belonging thereto, and used by said company in its business of manufacturing."

This mortgage was, on the 7th day of May, 1890, duly recorded as a mortgage of real estate in the Records of Mortgages, vol. 59, p. 165, of Seneca county, Ohio. The mortgage was never verified, as required by the statute of this state covering chattel mortgages, and was not filed as a chattel mortgage, nor refiled at the expiration of any of the several years since its execution, as required by the Ohio statutes governing chattel mortgages. In April, 1897, upon appropriate bill of complaint filed by the complainants, who are creditors, and bring the action in behalf of themselves and other creditors, Frederick A. Duggan was appointed an ancillary receiver of the Brewer Pottery Company, and thereupon he gave proper bond, and has ever since been discharging the duties of such receivership. Samuel B. Sneath filed his answer and cross bill in this action, setting up the mortgage above described, and upon appropriate proceedings the property was appraised and sold under the order of this court, and the fund arising from such sale paid into court to await the further order of the court. Before the sale was made, however, a commissioner was appointed by this court, and directed to separately appraise the real property and the chattels of the Brewer Pottery Company, in order that the court might thereafter determine the proper mode of distribution of the proceeds of the sale. Such appraisalment was reported in three schedules, as fol-

lows, viz.: (1) Real estate containing eight acres of land, together with the brick pottery plant situate thereon, and including all its engines, machinery, and fixtures attached, not included in the second and third schedules, appraised at \$40,000. (2) Fixtures, machinery, and appurtenances attached to the real estate, appraised at \$550. (3) Tools, machinery, molds, sappers, bats, ware boards, not in any manner attached to said realty, but used by said company in the business of manufacturing, appraised at \$12,363.

Two questions are presented in the case: First. Can a receiver of the property of this corporation avoid a prior chattel mortgage of the corporation on the ground that it was not filed as required by the law relating to chattel mortgages in the state of Ohio? Second. As to what property described in it, was it a chattel mortgage?

Conclusions of the Court.

1. The mortgage in this case was a mortgage of real estate as to the property embraced in schedules 1 and 2, and a chattel mortgage as to the property embraced in schedule No. 3. As to the property in schedule No. 3, it came within the provisions of section 4150 of the Revised Statutes of Ohio, which are as follows:

"Sec. 4150. [Mortgage of Chattels Void Unless Filed.] A mortgage or conveyance, intended to operate as a mortgage, of goods and chattels, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as directed in the next section."

It is admitted that the provisions of this section with respect to the mortgage in question were not complied with, and that no attempt was made to do so.

2. The receiver, on his appointment, succeeded to the rights of creditors as well as of the debtor company, and he had the power to enforce the rights which the creditors, but for the proceedings under which the receiver was appointed, might have enforced in their own behalf. While there have been many other cases and authorities cited which warrant this opinion, the case of *Farmers' Loan & Trust Co. v. Minneapolis Engine & Machine Works*, 35 Minn. 543, 29 N. W. 349, is so analogous in all respects, and the reasons stated are so cogent, that it alone is conclusive of this case, especially in view of the fact that the laws with respect to filing of chattel mortgages in the states of Minnesota and Ohio are substantially alike. In that case, concerning the functions and power of a receiver, the court say:

"The proceeding is for the benefit of all the creditors, for all may come in and share in the distribution. Its purpose is to take all the property of the corporation, convert it into money, and apply the proceeds in payment of its debts. The sequestration is in the nature of an attachment or execution on behalf of the creditors. Bankruptcy proceedings have been likened to an equitable attachment (*In re Hinds*, 3 N. B. R. 351, Fed. Cas. No. 6,516) in respect to their purpose and their effect on the debtor's property. Bankruptcy proceedings, when involuntary, are similar to the proceedings under consideration. The assignee in bankruptcy may avoid a chattel mortgage void as to creditors for want of filing. *Bank v. Hunt*, 11 Wall. 391. He succeeds to the rights of creditors, as well as of the bankrupt. *Bump, Bankr.* 513, and cases cited. A receiver in proceedings supplementary to execution

also has the rights of the creditors at whose instance he was appointed, as well as of the debtor, and may avoid transfers void as to such creditors, though good as to the debtor. High, Rec. § 454, and cases cited. A receiver of an insolvent corporation has the same powers and functions as a receiver upon a creditors' bill, or upon proceedings supplementary to execution. *Powers v. Paper Co.*, 60 Wis. 23, 18 N. W. 20. That he should have the power to enforce the rights which the creditors, but for the proceedings, might have enforced in their own behalf, seems reasonable. The pendency of the proceedings disables the creditors to go on, each in his own behalf, to enforce his claim by action, judgment, execution, and levy. So that, unless all the rights of the creditors can be enforced in this proceeding, unless their right to avoid transfers can be made available by means of it, then it is, to some extent, an obstruction, rather than a remedy, to them. It is evident that it was intended to facilitate, and not to hinder, a complete remedy; and this it will not do unless its scope is to apply to satisfaction of the creditors all the property of the corporation applicable to that purpose,—that is, all the property which, but for the proceeding, they could have so applied. For these reasons, we decide that the receiver may avoid any transfers void as to creditors."

In determining what property was realty and what personalty, the court quote with approval the general rules laid down by that court in *Wolford v. Baxter*, 33 Minn. 12, 21 N. W. 744, and in applying those rules to the case under consideration say:

"The rule indicated by what we have quoted seems to be that, where a building is constructed and fitted for a particular kind of manufacturing, and machinery necessary and adapted to that kind of manufacturing is placed in the building with intent that it shall remain and be used permanently in the business, and as a part of what may be termed the outfit for the business, the different articles of such machinery thereby become fixtures, though not in any way, either actually or constructively, annexed to the land. There are few cases that dispense with annexation to the realty, either by the thing itself being in some way annexed, or its being accessory to and a necessary part of some other thing which is annexed. Few regard as sufficient a mere ideal annexation; that is, a connection between the realty and the thing existing only in intent, and not in fact. In the case referred to, this court said: 'While physical annexation is not indispensable, the adjudicated cases are almost universally opposed to the idea of mere loose machinery or utensils, even where it is the main agent or principal thing in prosecuting the business to which the realty is adapted, being considered part of the freehold for any purpose. To make it a fixture, it must not merely be essential to the business of the structure, but it must be attached to it in some way, or at least it must be mechanically fitted, so as, in ordinary understanding, to constitute a part of the structure itself. It must be permanently attached to, or the component part of, some erection, structure, or machine which is attached to the freehold, and without which the erection, structure, or machine would be imperfect or incomplete. * * * Intent alone will not convert a chattel into a fixture.' Any less exacting rule than that laid down would, in effect, do away, in a great variety of cases, with the fundamental distinction between real and personal property. The general rule is that, to be a part of the realty, the machine must be physically attached to it, or be, in ordinary understanding, part of a building upon it; as where the building is wholly or in part constructed for the machine, or the machine is constructed for the building, or some part of it, and is fitted into it. The instances where this is not required are exceptional, and we do not think the exceptions should be extended. Intention is important to be considered in determining whether an article is or is not a fixture, not, however, that it may, as some few of the cases seem to hold, be in lieu of actual or constructive annexation; but when an article is annexed it is important to inquire, was it annexed with intent to make it a permanent accession to the freehold, or for only a temporary purpose? And, where attachment once made is severed, was the severance intended to be permanent or temporary?"

The order of the court will be that the lien of the defendant Samuel B. Sneath, trustee, attaches only to the property of the Brewer Pottery Company described and appraised in schedules 1 and 2; that the property described and appraised in schedule 3 is not subject to said mortgage, but is to be applied to the payment of the claims of the unsecured creditors, including the unsatisfied claim of said Samuel B. Sneath, as trustee, after applying the pro rata amount to be realized from the sale of the property in schedules 1 and 2. And in ascertaining the amounts to be distributed the sum of \$5,000, forfeited by Albert Brewer, is to be added to the sum of \$36,075, the proceeds of sale, from which the costs and expenses of this suit are first to be deducted.

HARRISON v. GERMAN-AMERICAN FIRE INS. CO.

(Circuit Court, S. D. Iowa, E. D. September 16, 1898.)

No. 265.

1. BILL OF EXCEPTIONS—FAILURE TO FILE IN TIME—RELIEF.

A party who has not filed his bill of exceptions within the time limited will not be absolutely denied relief where it appears that he was not notified within that time of the filing of the decision; that such bill was subsequently offered at a time when he supposed he had the right to file it; that a further delay in applying for relief was occasioned by illness, and a well-founded belief that the adverse party would consent to a reinstatement of the cause in a position for a valid appeal; and that he has acted in good faith and with reasonable diligence throughout.

2. DECISION FILED IN VACATION—VALIDITY.

It seems that a decision appearing of record as filed in vacation is not coram non judge, although the court was not in actual session, where it had not formally adjourned sine die, particularly where the decision is a denial of a motion for new trial.

On Motion to Vacate Order Overruling Motion for New Trial.

D. N. Sprague and A. H. Stutsman, for plaintiff.

McVey & McVey, for defendant.

WOOLSON, J. This action has a somewhat peculiar history. Instituted in January, 1893, in the district court of Iowa, in and for Louisa county, it was removed to this court on application of defendant, and filed herein June 20, 1893. Trial was had to the court in July, 1894. The opinion of the court was handed down in November of that year, ordering judgment for plaintiff. Defendant having meanwhile filed his motion for rehearing, etc., the court, on December 24, 1894, ordered that no execution issue until further order of court, and time was given to defendant to file his brief in support of said motion. On February 6, 1895, and during the January term of court, judgment was formally entered, on the opinion theretofore filed, against defendant. The judgment entry closes as follows:

Defendant excepts, and is allowed twenty days to present brief and argument for rehearing, which is granted, and execution ordered suspended until hearing and decision on the motion.

On April 25th, following, the decision of the court overruling defendant's motion for rehearing was handed down, the same closing as follows:

To which defendant excepts, and is given sixty days to prepare, have signed, and filed such bill of exceptions as defendant may be advised is desirable. The clerk will enter due order as above, and notify counsel of record for both parties of the decision now reached.

The record entry relating thereto is given under the heading of "Vacation Entries," and is as follows (omitting title of cause, etc.):

This day, this cause coming on for hearing upon the motion of defendant for a rehearing of the above-entitled cause, and the court, having seen and read the briefs of counsel in argument, and being now fully advised in the premises, doth overrule the said motion for rehearing, to which ruling defendant at the time excepted. It is further ordered that defendant have sixty days in which to prepare, have signed, and filed his bill of exceptions, as defendant may be advised is desirable. Dated April 25, 1895.

On July 19th following, counsel for defendant forwarded by express, to the clerk of the court, in said Eastern division, his draft for bill of exceptions to be presented to the judge for signature. The 60 days provided in the order of April 26th for filing of bill of exceptions having already expired, the clerk returned this draft for bill of exceptions to counsel for defendant. The exact date when same was so returned does not appear, but it was very soon after the bill had been expressed to him.

On November 5, 1895, counsel for defendant forwarded to the clerk a petition for rehearing, which was filed on November 7th. This petition (after specifying assignments alleged as error) states as follows:

The opinion in this case was filed on the 25th day of April, 1895, and this defendant had no notice whatever that such opinion was filed, or that any decision had been made in said case, until more than sixty days had expired, within which the defendant was to prepare, tender, and have filed a bill of exceptions. That the defendant's counsel understood the court to say, when the case was taken under advisement, that the clerk would notify the defendant when the decision was rendered; and the defendant avers that neither the clerk nor the court nor any one else ever notified this defendant that any decision had been rendered in said cause until after the same appeared in volume 67 of the Federal Reporter. The defendant says that the first notice that it had that a decision had been rendered and filed in said case was learned from the publication of said opinion in the 67th volume of said Federal Reporter, as the same came out in the advance sheets, which was more than sixty days after the filing of said opinion, and that this was not confirmed until about the 1st of July by the judge who rendered the opinion. That the defendant desired to take, and is now desirous of taking, an appeal from the decision of this court in said case, and was prevented from so doing by being unable to tender a bill of exceptions within the time provided in the judgment. That by the printed opinion in said Federal Reporter (page 591), ninety days is given in which to prepare, sign, and have filed a bill of exceptions. That this defendant did within ninety days from the 25th of April, 1895, have prepared, and did send, a bill of exceptions to the judge, notifying counsel on the other side to have the same allowed and signed. That defendant was then informed that the order of the court stated that the bill of exceptions should be prepared and filed within sixty days after the rendering of the opinion in said case, and that the court failed and refused to sign said bill of exceptions. This defendant has not examined the record in said case, but has been informed by the clerk of said court at Keokuk that the opinion in said cause provided that sixty, instead of ninety, days should be given in which to file a bill of exceptions. That this defendant believes that there is an error in the finding and judgment of this court, and desires to take an appeal, and has the statutory right to have an appeal, and would have appealed had the bill of exceptions been allowed upon which

it based its appeal; and that, without the bill of exceptions, no appeal can be taken, as counsel are advised in this case. This application would have been made sooner but for the fact that negotiations have been pending between counsel for defendant and plaintiff with a view to arrange for a bill of exceptions; and one counsel for plaintiff, to wit, Judge A. H. Stutsman, informed counsel for defendant that he believed that counsel for plaintiff should have consented to the filing of a bill of exceptions without going to the trouble and expense of making this application; but the other counsel for plaintiff felt constrained on account of the wishes of his clients to withhold his consent to the filing of said bill of exceptions, but has at no time positively refused to allow the same to be taken and allowed. Defendant further says that this application is not made for delay, but in the interests of justice; and, unless this rehearing is granted, this defendant will be prevented from appealing to the circuit court of appeals, and taking the judgment of that tribunal, as it has a right to do; and it will be so prevented without any fault or negligence upon its part, or that of its counsel.

These statements are verified by the oath of A. H. McVey, the counsel for defendant, who has had sole charge of the case on part of defendant.

On June 23, 1898, counsel for plaintiff and defendant appeared before the judge of this court, and partial hearing was had in the matters herein then pending, and on a further motion for an order setting aside the ruling of April 25th above given. This latter motion, which was orally presented on said partial hearing, was subsequently reduced to writing, and is among the files herein. The written contents of said motion are verified by the oath of said A. H. McVey. Pursuant to agreements made at said partial hearing, counsel have submitted written arguments on the two motions above described as pending, and the matter is now to be formally decided.

From the foregoing history of the case, there naturally arises the suggestion that much delay has attended the efforts of counsel in the matter of obtaining a ruling upon motion for rehearing, etc. The professional statements of A. H. McVey (counsel for defendant, who has had for defendant sole charge before the court of this case), as made before the judge, convincingly show that he received no notice from the clerk of this court of the ruling had of record April 25th. The clerk was therein directed to notify counsel of the overruling of motion for rehearing, etc. The deputy then having charge of the clerk's office in the Eastern division states that such notice was sent by mail to counsel for defendant. But I am satisfied from the professional statements of counsel that such notice failed to reach him. The showing is without contradiction that defendant's counsel did not know or learn that his said motion had been overruled until after the 60 days provided in said order of April 25th had expired. In the opinion, deciding the main case, and ordering judgment against defendant, 90 days were allowed for filing bill of exceptions by defendant. This opinion was not published until after decision was had, on said motion for rehearing. This publication occurred some time early in the July following said entry of April 25th. As counsel for defendant had not been notified of any change in time for filing bill of exceptions, he appears, as he naturally might, to have accepted this 90 days as applicable after ruling on motion for new trial; and within such 90 days his bill of exceptions was presented for signature, when for

the first time he learns that the time for bill of exceptions had been shortened to 60 days by the last order relating thereto.

Had counsel for defendant received notice from the clerk of the action and order of April 25th, decision could be quickly reached herein. He would be held to have neglected compliance within the period fixed in such order. If, immediately after he learned of the fixing of the 60, instead of 90, day period, and after he had presented his bill of exceptions for signature, if defendant had forthwith laid the facts before the court, the court would have taken such action, so far as within its power, as would have reinstated defendant in position to have had a bill of exceptions validly signed. The question is now complicated with the delay which has occurred.

The showing is uncontradicted that from the time when counsel for defendant learned, too late, of the order of April 25th, up to the filing of his motion, in November, 1895, he had been negotiating or attempting to arrange with counsel for plaintiff for such action by the court as would reinstate defendant in a position for valid appeal. That period is satisfactorily accounted for. It is shown to the court that, after such motion was filed, counsel was still actively engaged in attempting to obtain what he expected he would obtain,—this reinstatement of position by consent. While thus engaged, counsel for defendant was stricken with disease, occasioned by accidental poisoning, which for many months wholly incapacitated him for professional labor, and left him for an extended period greatly weakened in working ability. The showing is further made that different periods were set by counsel on either side for presentation of pending matters to the court for decision, some of these periods being in term, and some at chambers; but that, until the partial hearing in June last, the effort to bring counsel on both sides and court together had failed. Some of this failure is attributable to the fact—now about to be relieved—that the official residence of the judge was not at either point where court is regularly held, and some difficulty had for this reason been experienced in presenting these matters in chambers. As instance, in this case, where counsel, without having first consulted or notified the judge, agreed to meet at the judge's chambers in the city of his residence, and present matters herein for decision, but were disappointed to find, on arriving at his chambers, that the judge was temporarily absent, and would remain for some days to come. The court also may not overlook the fact that, where it is possible for counsel to agree, such course is generally much more agreeable to them than a compulsory ruling of the court. And delay frequently is had, as in this case, to obtain such agreement. I do not intend to intimate that there existed any attempt on part of plaintiff's counsel to "troll" counsel for defendant along in unfounded expectation of agreement until his rights had been outlawed by time. There appears in this case nothing whatever which could justify any such intimation. But I can readily understand how counsel might anticipate and believe such agreement was possible and practicably in sight, because of opposite counsel not having positively and clearly refused to agree.

If the delay can be excused, so that defendant may be reinstated to his rights to appeal, has the court the power so to reinstate? The gen-

eral principle is just that wherever a party litigant has not, by censurable delay or neglect on his part, forfeited his rights, the courts have the power to place him in position for obtaining a full and final hearing. Sometimes he is compelled to go into equity, that proceedings at law may be stayed while he is pursuing his remedy. Generally speaking, however, a court at law has full power over the judgment it has rendered, while a timely motion for new trial or the like is pending. If the motion lag on its course to final decision, either party may press same to submission. The motion timely filed herein was by the judge decided at a time when court was not in session in the Eastern division of the district, in which division this case was tried. The decision was forwarded to the clerk's office in that division, and by the clerk there entered of record as among "vacation entries." Defendant's counsel vigorously contends that the decision of such motion in vacation, and without previous agreement of parties, is invalid, as *coram non judice*.

The practice obtaining in some of the other districts obtains here, of entering no order of *sine die* adjournment at the close of the actual sitting of the court for a stated term. The court is left open, so that further sitting may be taken up as a part of that term, at any time when the business of the division requires it. When the date has arrived, under the statute fixing the terms, for the commencement of a term, the clerk enters the *sine die* adjournment of the last term. Such was the practice when said entry of April 25th was made. I am not prepared to hold that the entry is not valid because court was not in actual session. Again, this entry was not an adjudication between litigating parties of rights which were claimed and disputed and at issue on the merits of the controversy. Such adjudication had been closed, at least for the time being, in the February preceding, by formal entry of judgment during the term. And I am not prepared to hold that a motion looking to a new trial may not be decided, and decision thus entered in "vacation"; that is, thus between the periods by statute fixed for convening of court. The pending motion was an obstruction to the free execution of the judgment, and the decision overruling such motion merely removed such obstruction. True, had the motion been sustained, and the judgment ordered vacated and set aside, this different state of facts might necessitate a different conclusion thereon.

To my mind, the decision of pending question must be determined by considering whether such delay has attended defendant's case as to compel the court to so rule as to prevent appeal herein. I am exceedingly reluctant, under whatever situation, so to decide as that a party litigant who, in good faith as to its correctness, is contending for his position, shall be prevented from having a review of his case when he is met with adverse decision at *nisi prius*. What I most ardently desire is that every action heard before me shall terminate in a just and correct decision. If a litigant in good faith differs from the decision reached, and truly believes the decision adverse to him is the result of erroneous consideration of fact or law, he shall have, so far as within my power, the opportunity to have that decision reviewed, if he timely exert himself in lawful efforts for such review. If the decision has been rightly reached, we may safely assume it will be confirmed on appeal, and such confirmation should be promptly had. If such deci-

sion is founded on erroneous views of law or facts, then every facility should be afforded which will speed its being promptly presented to the appellate tribunal, that the error may be pointed out and corrected.

There is no question in this case of the good faith with which defendant's case has been and is presented. The energetic trial, the persistent efforts, first for new hearing, and again for appeal, abundantly prove the underlying good faith. If I may properly do so, I desire, as stated to counsel on either side at the (partial) oral hearing, so to order as to afford this right of appeal. Defendant's counsel believed—and, under the circumstances shown, might rightly have believed—that he had prepared his bill of exceptions in time under the order. But the court, in the latter order, had lessened the time which in the earlier order had been granted for such bill. The court relied on notification promptly issuing from the clerk's office to counsel for defendant of the new action taken. Such was the order of the court. By accident, apparently, the order of the court in this respect did not reach defendant's counsel until the 60 days—the lessened time named in the later order—had expired. Counsel in good faith relied on the time first named, and acted accordingly. Thus far my mind is clear. But I am not entirely satisfied with the explanation of the subsequent delay. And yet I am not satisfied that such delay, under the circumstances above in part narrated, should deprive defendant of his right, otherwise his due, to have the decision of the appellate tribunal, before the case is finally closed. True, if plaintiff is entitled to judgment, he should not be unduly postponed. But action has not been specially pressed by plaintiff in the matters now under consideration; and, if he be entitled to the judgment he now has, the law will compel defendant to pay the same, with interest meanwhile accruing.

On the whole case as now presented, I am inclined to so act, as far as within my power, as that defendant shall be permitted to present the case to the appellate court. I am not satisfied that, under the circumstances, duty will require me to deny him this opportunity; and only when my judgment convinces me that such is my imperative duty will the door leading to an appellate hearing be closed by me against a litigant in good faith sincerely contending for what he claims are substantial merits which my decision has denied him. But I am not ready to open this case for further nisi prius hearing, nor for further delay. At the trial, and by briefs, and again by extended written arguments after decision was handed down, defendant has presented his view of the case. With that he must be content, so far as this court is concerned. There remains open to him only the approach to the appellate tribunal. But, in taking that, there must be left no disputed questions relating to the validity of the judgment herein, unless same be reversed in appellate hearing, and review must be promptly pressed. Counsel for plaintiff may at once prepare and submit to counsel for defendant such record entries, if any, as they may deem necessary or proper to be entered in this case, for the purpose of supplying any deficient or defective record or other entry herein, so that merely technical questions shall be dispensed with, and the only questions which may be presented on appellate hearing relate to the merits of the litigated controversy. If defendant shall assent to nunc pro tunc entries in any matters thus reason-

ably proper or necessary, the decision and record heretofore made, and now obstructing the path of appeal by defendant, will be changed, and, so far as necessary to permit defendant to present this case to the appellate tribunal, will be vacated and set aside, and new entries therefor substituted. Counsel for defendant will forthwith submit to counsel for plaintiff such record entries as he may deem necessary to carry out the suggestions herein made, and also bill of exceptions relating to the trial, etc., with the view and expectation that on the first day of the next term, soon approaching, in the Eastern division, the proper entries may be made, bill of exceptions signed, and all proceedings essential to appeal (including citation and supersedeas) may be then taken, and appeal then perfected, so far as possible, and except as to transcript by clerk. Defendant may meanwhile prepare for presentation on said first day of next term in Eastern division his supersedeas, in the penal sum of \$7,000. And, for the purpose of completing the matters hereinbefore just specified, this case is specially assigned for 2 p. m. of the first day of the next term of court in said Eastern division. The clerk will forthwith notify counsel of action as herein specified.

BOARD OF COM'RS OF VAN WERT COUNTY, OHIO, v. PEIRCE.

(Circuit Court, N. D. Ohio, W. D. December 29, 1898.)

1. ACTION AGAINST FEDERAL RECEIVER—REMOVAL.

Whether authority to sue a receiver appointed by a federal court is given by the court or conferred by statute, the action arises under the laws of the United States, and it is removable to a federal court.

2. OBSTRUCTION OF STREAM BY A RAILROAD BRIDGE—INJUNCTION.

The evidence showed that a railroad crossed, by a wooden bridge 73 feet long supported on rows of piles, a stream about 30 feet wide, and from 1 to 2 feet deep, but which in February and May of each year flooded the country above and below the bridge for 6 or 8 miles. A county-road bridge of one wooden span, resting on two stone abutments, 31 feet apart, crossed 25 feet above the railroad bridge, and 90 feet above this bridge was a floodgate stretched across the stream by riparian owners on both sides, to prevent cattle escaping. The approaches to the railroad bridge were on high banks, and there were six rows of piles, 14 feet apart, and four piles in each row. One row stood in midstream, and the others were on or near the bank, ranged substantially in line with the current. There was no evidence that any particular damage was done by freshets because of the single row in midstream or the others. The space for a flood under the railroad bridge was more than double that under the county bridge, and the weight of the evidence showed that debris, ice, and timber, during high water, caught against the bank of the highway bridge rather than against the bents of the railroad bridge, and still more was caught by the floodgate. *Held* insufficient to authorize an injunction against building a new railroad bridge by driving down new piling parallel with the old, which were to be afterwards removed, on the ground that the piles driven to support the bridge would unduly obstruct the stream and injure the county highway and farms lying in the river valley.

Thomas J. Trippy, for commissioners.
Browb & Geddes, for receiver.

TAFT, Circuit Judge. The petition in this case was originally filed in the common pleas court of Van Wert county, Ohio. It prayed for

an injunction against R. B. F. Peirce, receiver of the Toledo, St. Louis & Kansas City Railroad Company, appointed by this court, to prevent him from building anew a railroad bridge over the Little Auglaize river, in Van Wert county, Ohio, on the ground that the piles driven to support the bridge would unduly obstruct the flow of the water in the stream, and injure a county highway and the property of farmers lying in the valley of the river. A temporary injunction was issued ex parte by the probate judge in the absence of the common pleas judge from the county. Counsel for the receiver applied to this court for an order against the county commissioners to show why they should not be attached for contempt of court for interfering with the possession of the receiver of this court by injunctive process. The prosecuting attorney of the county appeared at the hearing of the application, and the court, being satisfied that the petition was filed in good faith, made an order authorizing the commissioners to bring the suit against the receiver of the court, and ratifying the suit as brought as under such authority. Thereafter, and before the receiver was required to answer under the Code of Ohio, a petition was filed by the receiver in the common pleas court for Van Wert county, praying for a removal of the cause to the circuit court of the United States for the Northern district of Ohio, the Western division. A proper bond with sufficient security was tendered the common pleas court, but that court declined to make the order of removal, on the ground that the cause was not removable. The counsel for the receiver nevertheless filed a transcript in this court, and now makes a motion to dissolve the preliminary injunction, on the theory that the cause is removed and that this court has jurisdiction thereof.

The first question to be disposed of is the question of jurisdiction. The petition for removal stated three grounds upon which the removal ought to be had. The first ground was that the action against the receiver was necessarily ancillary to the main suit in which the receiver was appointed in this court; the second ground was that the suit arose under the laws and constitution of the United States; and the third was that the receiver was a citizen of Indiana, and that the complainants were citizens of the state of Ohio, at the time of the bringing of this suit. Since the suit was removed, the receiver, R. B. F. Peirce, has resigned, and a citizen of Ohio, Samuel Hunt, has been appointed in his stead. Whether this change in receivers would affect the jurisdiction of this court, once attaching, is a question which I need not discuss, because the suit is plainly removable, under the laws and constitution of the United States. It is decided in *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, that a suit against a receiver of a federal court may be removed from a state court to the proper circuit court of the United States because it arises under the laws and constitution of the United States. It does not affect the removable character of the suit that leave was given by this court to bring the suit against the receiver. That leave was given merely to eliminate from the case any ground on the part of the receiver for objecting to the issuing of the injunctive process against him. It is not now necessary to decide whether an injunction issuing out of a state court against a receiver of a federal court to prevent such receiver from using the property in his charge in a certain

way is an interference with his possession of such a character as to require the consent of the court appointing him before the process may issue. Whether the authority to bring the suit is given by the court appointing the receiver, or is conferred by statute, in either case it comes from a federal source, and therefore the suit thus authorized arises under the laws of the United States. The consent which the court gives for the bringing of the suit does not estop the party or the court from granting a removal thereafter. The consent only goes to the right to serve process upon the party sued. It cannot have the effect of curtailing the course of procedure which the receiver may be entitled to take thereafter in the conduct of the suit. If he deems it wise, in the interest of the trust, to remove the suit to the jurisdiction to which the law gives him the right to remove it, there is nothing in the preliminary consent of the court appointing him which will prevent his taking such a course.

The remaining question is upon the issue whether the restraining order issued ex parte should be dissolved. The evidence shows that the Auglaize river, except in February and May, is a stream about 30 feet wide, and from 1 to 2 feet deep, but that in February and May of each year there are freshets which flood the country above and below the bridge for 6 or 8 miles. It appears that 25 feet above the railroad bridge is a county road bridge of one wooden span, resting on two stone abutments, 31 feet apart. Ninety feet above this county-road bridge is a floodgate stretched across the stream to prevent the escape of cattle by the riparian owners on both sides. The railroad bridge was erected in 1886. It is a wooden structure, and is supported on rows of piles. The railroad bridge is 73 feet long. The approaches are on high banks. There are six rows of piles or bents, as they are called, 14 feet apart. In each row there are four piles. One row of piles stands in midstream, and the others are on or near the bank. The piles in the row are ranged substantially in line with the current of the stream. The old piling has grown insecure, and the receiver has driven new piling, parallel with the old, and proposes to take out the old, and would have taken it out before this but for the injunction. There is no evidence of a satisfactory kind that shows that any particular damage has been done by the freshets by reason of the single row of piling in midstream or the other rows. The space for flow of a flood under the railroad bridge is more than double that under the county bridge, only 25 feet above. The weight of the evidence shows that the debris and ice and timber which are floated down the stream during the high water catch against the bank of the highway bridge, rather than against the bents of the railroad bridge, and that still more debris is caught by the floodgate, 90 feet above. The situation has been illustrated by photographs and maps, so that from the statements in the affidavits, together with these illustrations, I am able to get quite a good idea of the matters in dispute. An examination of the proof satisfies me that there is no ground for the complaint in the petition of the commissioners, and that the receiver ought to be allowed to go on with his bridge, and to take up the old piling, which will remove much of the obstruction of which the plaintiffs complain.

The motion for a dissolution of the temporary injunction is granted, and the clerk will make an order accordingly.

ELK FORK OIL & GAS CO. v. JENNINGS et al.

FOSTER v. ELK FORK OIL & GAS CO.

(Circuit Court, D. West Virginia. December 22, 1898.)

1. OIL AND GAS LANDS—FUNDS FOR DEVELOPMENT.

Pending the determination of the title to certain oil lands, the court appointed a receiver to take charge of and develop the property, the necessary funds to be furnished by the title claimants, with the understanding between them that they were to be refunded to them from the sales of oil, should the same be sufficient. *Held* that, the title to the land having been found to be in one claimant, the other was entitled to such reimbursement.

2. RECEIVERS—COSTS.

The fact that two claimants under oil leases, at whose instance a receiver has been appointed, fail to sustain their claims, will not necessarily require that the costs of the receivership shall be charged to them, rather than to the funds in court, which are part of the subject of the receivership.

W. P. Hubbard, for Elk Fork Oil & Gas Co. and L. A. Brenneman, receiver.

Alfred Caldwell, for E. H. Jennings and others.

B. M. Ambler and A. L. Weil, for George E. Foster.

Henry M. Russell, for C. W. Brockunier, receiver.

V. B. Archer, for W. A. McCosh, receiver.

GOFF, Circuit Judge. This court has heretofore disposed of the main questions involved in these cases. 84 Fed. 839. They are now submitted upon the applications of the receivers for compensation for the services rendered by them; upon the application of George E. Foster for the refunding to him of certain advances made by him to the receivers under orders of the court; and upon exceptions of the Elk Fork Oil & Gas Company and of Receiver Brockunier to the master's report.

Without making special reference to the testimony or to the arguments of counsel based thereon, I conclude that the receivers are entitled to compensation, and that, under the circumstances applicable to the individual services of each receiver,—keeping in view the time they were respectively employed in the discharge of their duties, as well as the responsibilities they assumed,—an allowance of \$200 per month to McCosh, and of \$300 per month to Brockunier, during the time they respectively served as receivers, will be fair to them and just to the parties in interest.

Under certain orders of the court, made on the 13th of April, 1897, and on the 20th of May of that year, George E. Foster, defendant in one suit and complainant in the other, and also the Elk Fork Oil & Gas Company, complainant in the original suit and defendant in the cross bill, made advances of money and materials to Receiver Brockunier, to be used by him in the development of the property in controversy; the former to the amount of \$28,119.56, and the latter in the sum of \$17,000. Since these advancements were so made, this court has decided the questions relating to the title to the leases in controversy between the different parties to this litigation, and as the result thereof the said Elk Fork Oil & Gas Company has been given the pos-

session of the land described in the same. That company, having the title and the possession of the property, and being entitled to the production from it, and also the funds in the hands of the court coming therefrom, makes no application to have refunded to it the advancements made by it; but Foster, who is quite differently situated, having lost his title to and the possession of said lands for oil purposes, as also any interest in the fund in court, requests that he be reimbursed the full amount of his advancements. The Elk Fork Oil & Gas Company objects to such reimbursement of Foster, and insists that the orders appointing the receivers, as well as those authorizing the advancement of money and materials, were irregular, and are invalid because of the fact that notice was not given to it prior to the entry of said orders that a receiver would be asked for and also authority to borrow money on the credit of the property be requested of the court.

On the 13th of April, 1897, the Elk Fork Oil & Gas Company moved the court for an injunction against Foster, and for the dissolution of an injunction which Foster had obtained from this court on the 6th of April, 1897, against it, which said motions were argued by the counsel of all the parties in interest, and taken under advisement. The court (Judge JACKSON), without passing on those motions, appointed Charles W. Brockunier receiver of the oil and gas rights in the 50 acres of the B. F. Hawkins lease, and the court so acted without any of the parties having asked for the appointment of a receiver. As the case then stood, the Elk Fork Oil & Gas Company had an injunction (the same having been granted by the circuit court of Tyler county, W. Va., before the case was removed to this court) by which Jennings, Guffey, and others were restrained from taking possession of any part of the land in controversy, and at the same time Foster had a restraining order which prevented said company from proceeding with the development of the leases, while the operations of adjoining owners were injuring the interests of the true owners of the leases in dispute. Thus, all of the claimants were prohibited from searching for oil, though all of them were insisting on their right so to do, and advising the court that the delay in doing so was most detrimental to their leasehold interests and to the rights of their lessors. It was under these circumstances that the court concluded that it would retain the possession and prosecute the development, under the impartial management of its receiver. It did not then appear to the court—for it was not then shown by the record—that the Elk Fork Oil & Gas Company was the legal owner of the property; and it is worthy of remark that, without the aid of the evidence subsequently placed in the record, the Elk Fork Oil & Gas Company would not have been entitled to the decree rendered in its favor, for the court could not have presumed either the forfeiture or the abandonment of the leases given to Johnston, whose assignees were before the court claiming their validity. The said oil company insisted that the Johnston leases were void, because, it is alleged, of the failure of the lessee and those claiming under him to do certain of the material things set forth in, and made part of, the contract of lease. The questions then presented to the court were not matters of law alone, but they were mixed questions

of law and fact. The court, therefore, declined to give the possession to any one of the claimants; for, with the conflicting interests of the various adjoining leaseholders, that would have been inequitable, even though bond had been required. Foster was the owner of leases located near to, and some of them adjoining, the territory in dispute, and it was for this reason that the other claimants dreaded to see the possession go to him, for they presumed that he would so conduct his development as to cause it to inure to the benefit of his separate and undisputed holdings. Likewise also did Jennings, Guffey, and the Elk Fork Oil & Gas Company hold leases similarly situated, in which Foster was not interested, and he, I presume, had the same right to fear them that they had to dread him. The subsequent developments, as shown by the testimony, demonstrate that the conclusion reached by the court to appoint a receiver was, as the case was then presented, the wisest plan, consistent with the conflicting interests, that could have been adopted, though likely it would have been better for, and less expensive to, the Elk Fork Oil & Gas Company had it then been placed in possession. This litigation is not without its hardships,—misfortunes to both the successful as well as the losing parties,—and yet in this regard I do not know that it is peculiarly exceptional. The court regrets that the expenses attending the receivership have been so heavy, and that the other costs amount to the large sum that they do, and yet the expenditures seem to have been unavoidable, and are to be attributed to the importance and magnitude of the litigation. Surely, the Elk Fork Oil & Gas Company will not complain because a small part of its abundant supply of oil has been used as a lubricant on the machinery from which has been evolved the incandescent light by which it reads its title clear to all of the now well-developed property for which it has contended.

It will not be necessary to further consider the different orders of the court relating to the receivers, extending their jurisdiction over other leases, and providing for the advancements which were made to one of them, as, from the conclusion I have reached, it will be unprofitable to do so. I think it is clear that the advancements were made under the court's orders and with the understanding between the parties that the amounts so advanced should be returned to those making them, provided the sales of oil produced from the property, under the developments authorized by the court, realized a sum sufficient for that purpose. That also was the evident intention of the court, in which the parties manifestly acquiesced. The fact that Foster lost title to the leases claimed by him is no reason why he should not, under the circumstances of this case, have the advancements made by him refunded, as contemplated by the court's order. Had the Elk Fork Oil & Gas Company failed in its contention concerning the leases in suit, still it would have been entitled to a decree in its favor for the \$17,000 advanced by it to Receiver Brockunier.

It follows from what I have said that the allowances to the receivers will be paid out of the funds under the control of the court. While it is true that Receiver McCosh was appointed on the motion of defendants Jennings and Guffey, and that said parties have failed

to sustain their claims relative to the leases over which said receiver had jurisdiction, still their action in the matter was not of that character, nor the circumstances attending this case such, as would justify the court in charging to them the costs incurred by that receivership. The court had, previous to the appointment of McCosh, indicated the policy it would pursue, and said defendants in making the motion mentioned were in fact but accepting the invitation which had been judicially extended to them. After the action of the court, on the 13th of April, 1897, when Brockunier was designated as receiver, it would have been useless, if not disrespectful, for said defendants to have applied, on the 17th of that month, for an injunction, founded on grounds that were substantially the same as those set out in the applications which had but recently been rejected. While it is true, as contended for by counsel for the Elk Fork Oil & Gas Company, that it is sometimes the duty of a court to require the party who has, on allegations found to be untrue, improperly procured the appointment of a receiver, to pay the expenses occasioned thereby, including the allowances made by the court to such receiver, still, in my opinion, it would not be proper to apply that rule of law to this case, for the reasons I have already mentioned.

The exception of Receiver Brockunier to the master's report is sustained, as the true balance in his hands is \$26,588.01, and not \$26,819.83, as returned by the master.

The conclusion that I have reached renders it unnecessary for me to consider other questions raised by the exceptions of the Elk Fork Oil & Gas Company to the master's report, and as I am unable to see how, under the pleadings as they now are, the information asked for and insisted upon by that company can be used in this cause, I shall overrule said exceptions. If either misfeasance or malfeasance is to be insisted upon concerning the conduct of Receiver Brockunier, the charges should be duly filed, and an opportunity given him to reply, after which the case can be referred for the taking of testimony. The matters relating to the allowance of compensation to the counsel for the receivers and the costs connected with the master's report are reserved for further consideration.

ROBINSON v. WEST VIRGINIA LOAN CO. et al.

(Circuit Court, D. West Virginia. December 22, 1898.)

1. RECEIVERS—JURISDICTION TO APPOINT.

To give the circuit court jurisdiction to appoint a receiver for a corporation at the suit of a stockholder, it must appear that the amount in controversy, or the par value of the complainant's stock, equals \$2,000.¹

2. CORPORATIONS—ACTION BY STOCKHOLDER.

When a stockholder brings a suit in chancery against the corporation, he must show that he has made an earnest effort to secure remedial action by the corporation for the grievance complained of.

¹ As to "Jurisdiction of Circuit Courts as Determined by Amount in Controversy" generally, see note to Auer v. Lombard, 19 C. C. A. 75.

3. CORPORATION—SUITS AGAINST—INTEREST OF COMPLAINANT.

To entitle a stockholder to relief against a corporation, as a stockholder, he must show in his pleadings that he was the owner of stock at the time the matters complained of occurred.

McWhorter & Lowenstein and Howard & Handlan, for complainant.

Caldwell & Caldwell, Henry M. Russell, and Hubbard & Hubbard, for defendants.

GOFF, Circuit Judge. On the 15th day of October, 1898, on the application of the complainant, the circuit court of the United States for the district of West Virginia appointed George Baird receiver of the defendant company. Said receiver is now in the possession of the property of the West Virginia Loan Company, and the case is in my hands on the motion of the defendants to discharge such official, restore its property to said company, and dismiss the complainant's bill, for the reason that this court has no jurisdiction of the subject-matter of this suit. In this connection I have considered the original and the amended bills, the separate answer of the West Virginia Loan Company, the joint answer of the other defendants, the affidavits filed by complainant and defendants, as well as the argument of counsel.

Unless it appears to the satisfaction of the court that the amount in controversy in this suit, in connection with the matters set forth by complainant in his bills, is as much as \$2,000, or that the value of the stock held by the complainant in the defendant company at the time the transactions complained of took place was as much as \$2,000 (exclusive of interest and cost), this court cannot have jurisdiction of this suit. As to this point,—admitting that the complainant has sustained the allegations of his bill,—could this court, on the evidence before it, render a decree in favor of complainant for a sum equal to the said amount so stated to be essential to its jurisdiction? This is the true test, even though the amount claimed in the pleadings be stated at a larger sum. *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501; *Vance v. Vandercook Co.*, 170 U. S. 468, 18 Sup. Ct. 645. Even if it be conceded that the stock alleged in the bill to be the property of the complainant when said bill was filed was also his stock at the time the matters complained of occurred, still it is only by including the interest said to be due thereon—that is, by adding to the par value of the stock the coupon interest due thereon as charged—that the jurisdictional amount is reached. One of the grounds of asking the intervention of this court is the alleged insolvency of the West Virginia Loan Company, and yet, quoad the matter of jurisdiction, it is insisted that complainant's stock in said company is worth more than \$2,000, when its face or par value is less than that amount.

On the question of jurisdictional amount, I am forced, by the facts of this controversy, to find against the contention of the complainant; and I deem it best to allude to another matter, as to which the absence of material allegations makes his bill defective. It does not appear that the complainant has exhausted all the means within his reach to obtain from said company, or from its directors or stockholders, the redress he asks for in his bill, or, at least, such action as will pro-

tect his interests and conform to his wishes. Unless this appears, equity will not, in cases of this character, entertain the suit. When a stockholder of a corporation brings a suit in chancery for an accounting and for equitable relief in general, in his own behalf, he must not only set out in full the special grievances as to which he complains, but he must also show that he himself, as the representative of the stock complaining, has made an earnest effort—not a simulated one—to induce remedial action on the part of the managers of the corporation, or that he has made an honest effort to obtain action concerning said matters by the stockholders as a body, showing at the same time, in detail, the particulars of such efforts on his part.

Nor does it appear from the bill that the complainant was the owner of the stock now claimed by him at the time the matters complained of occurred. The allegation that he was the owner of the same at the time the suit was instituted is not sufficient. *Hawes v. Oakland*, 104 U. S. 450; *Dimpfell v. Railway Co.*, 110 U. S. 209, 3 Sup. Ct. 573; *Brewer v. Theatre*, 104 Mass. 378.

The motion to discharge the receiver is sustained, and an order to that effect will be entered. The case will be retained on the docket of this court, only for the purpose of adjusting the accounts of said receiver, and as soon as that has been completed an order will be signed by the court dismissing the same.

PLATT v. ADRIANCE (three cases).

(Circuit Court, S. D. New York. December 12, 1898.)

SECURITY FOR COSTS—SUITS BY RECEIVER OF NATIONAL BANK.

A receiver of a national bank, bringing suits in another jurisdiction against stockholders, is not exempted by Rev. St. § 1001, from being required to give security for costs. While in such suits process may, in a sense, be said to issue by direction of a department of the government, it does not appear that, in the event of an adverse decision, the costs taxed against the receiver can be paid from the contingent fund of such department, as contemplated by such section.

These are suits by William A. Platt, as receiver of the Commercial National Bank of Colorado, against I. Reynolds Adriance, William A. Adriance, and John E. Adriance, respectively, as stockholders in such bank. Heard on motions to require plaintiff, who resides in Denver, Colo., to file security for costs.

Silas Wodell, for the motion.

Omar Powell, opposed.

LACOMBE, Circuit Judge. Congress has provided that, in certain actions which are brought under federal statutes, no security for costs shall be given; but it was not so disregarding of the rights of the individual citizen as to deprive him of his right to costs in the event of his success. The section of the Revised Statutes reads as follows:

"Sec. 1001. Whenever * * * process in the law * * * issues from a circuit court * * * by direction of any department of the government no bond, obligation or security shall be required * * * to answer * * * in

costs. In case of an adverse decision, such costs as by law are taxable against * * * the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted."

If process in this case is taken out by the receiver of the national bank, plaintiff herein, "by direction of any department of the government," the case will be within the express language of this section, and no security for costs should be required, and, in the event of defendant's success, he may be paid his costs out of the contingent fund of the treasury department. In one sense, the receiver, who, in the language of the supreme court in *Kennedy v. Gibson*, 8 Wall. 498, is "the instrument of the comptroller of the currency," may be said to act under the comptroller's direction in bringing suits against alleged delinquent stockholders; but it would seem as if congress had in mind some more specific direction. To claims by successful defendants in such suits to be paid out of its contingent fund it is altogether probable that the treasury department would reply that it had not specifically directed such suits to be brought, and that the charge was not properly against congressional appropriations for the expenses of the department, but against the funds of the defunct bank, which the receiver might hold for distribution among its creditors. Inasmuch as congress has so carefully provided for the one case, and has failed to provide for the other, it must be assumed that it did not intend to relieve receivers of national banks from the ordinary obligations of nonresident litigants when they do not act under such direction as will make the treasury department contingent fund liable for costs. It is conceded that the right of the court to require security for costs from receivers is discretionary, but there can surely be no doubt as to how such discretion should be exercised. It would be most unjust if a defendant who succeeds in a suit brought here by the receiver could recover his costs only by going to Colorado, and himself suing there upon the judgment in his favor.

Unless, therefore, within 20 days, plaintiff shall file a certificate of the comptroller of the currency to the effect that process in this action is taken out by express direction of the treasury department, he will be required to file security (or deposit) for costs to the amount of \$100 in each case. Defendant may have 10 days after notification of the filing of such certificate or security in which to answer.

AMERICAN SURETY CO. OF NEW YORK v. WORCESTER CYCLE MFG.
CO. et al.

(Circuit Court, D. Connecticut. November 28, 1898.)

No. 975.

SUITS TO FORECLOSE SEPARATE MORTGAGES—RECEIVERS.

A bill was filed to foreclose a first mortgage on property which in part, at least, was already in the hands of a receiver of the court in a suit to foreclose a later mortgage, and the receiver, by leave of court, was joined as a defendant. *Held*, that the suit was not necessarily an independent one, and, as a decree would not necessarily disturb the receiver's possession, the bill would not be dismissed on demurrer.

This was a bill in equity by the American Surety Company of New York against the Worcester Cycle Manufacturing Company and others to foreclose a first mortgage. The cause was heard on demurrer to the bill.

Watrous & Day, for complainant.

Seymour C. Loomis, for trustee.

C. W. Artz, for receiver.

Butler, Notman, Joline & Mynderse, for Central Trust Co.

Breed & Abbott and others, for attaching creditors.

TOWNSEND, District Judge. Bill to foreclose a first mortgage. At least a portion of the property covered by said mortgage is the same as that in possession of the receiver appointed in the suit brought to foreclose a later mortgage to the Central Trust Company of New York. *Central Trust Co. of New York v. Worcester Cycle Mfg. Co.*, 86 Fed. 35, 90 Fed. 584, 91 Fed. —. The parties to the latter suit demur on the ground that it does not appear that leave of the court to file said bill separately has been obtained. Counsel for demurrants claim that this is an independent bill, and that, as the property is in the hands of a receiver appointed by this court, and as the bill prays for a foreclosure, and seeks to interfere with the possession of the receiver, it cannot be maintained; citing the opinion of Judge Wheeler in *American Loan & Trust Co. v. Central Vermont R. Co.*, 86 Fed. 390. If the decision of Judge Wheeler had covered the points involved in this case, I should follow it, but the cases are clearly distinguishable for the following reasons: In *American Loan & Trust Co. v. Central Vermont R. Co.*, supra, the suit was independent. The receivers were not joined as parties, and no leave to so join them was obtained. Here the suit is not necessarily an independent one. The receiver is joined as defendant by leave of the court, and a decree would not necessarily disturb his possession. Let an order be entered overruling the demurrer and directing the defendant to answer within two weeks from the filing of this memorandum.

NYBACK v. CHAMPAGNE LUMBER CO.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1899.)

No. 481.

1. TRIAL—DIRECTION OF VERDICT.

Where the evidence leaves substantial ground for doubt upon any material question of fact, the doubt should be resolved in favor of the right to a trial by jury, and a peremptory instruction is not justified.

2. MASTER AND SERVANT—ACTION FOR PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

The fact that an employé, in doing his work, went into a place which was unnecessary to its proper performance, and there stepped into a hole in the floor, and was injured, does not raise a legal presumption of his contributory negligence, where it appears that he was inexperienced, and had not been instructed as to the proper manner of doing the work, nor warned of the presence of the hole; but the question is a proper one for the jury.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

This was an action by a servant against his master for a personal injury alleged to have resulted from the defendant's negligence. A verdict for defendant was directed by the court, and plaintiff brings error.

J. J. Patek and D. B. Nash, for plaintiff in error.

John Van Hecke and Edward M. Smart, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The one question on this record is whether the circuit court erred in directing a verdict for the defendant. The action was brought by John Nyback, the plaintiff in error, to recover damages for a personal injury suffered while at work in a sawmill of the Champagne Lumber Company, the defendant in error, on July 12, 1892. The substance of the declaration is: That on and prior to the date mentioned the defendant owned, at the city of Merrill, Wis., a sawmill, in which, besides other machinery and appliances, there was a slasher, used for the purpose of sawing slabs and edgings. That on the south side of the slasher, and parallel therewith, was a series of short rollers, used for carrying from the main saw of the mill the lumber, edgings, and timber sawed thereon. That at the east end of the slasher, and close to the line of rollers, there was an "unguarded opening" in the floor of the mill. That at and near the slasher the mill was lighted at night with a small electric light suspended at the west end of the slasher at such a height that the shadow of the slasher frame made the opening indistinguishable to a person unacquainted with the mill, although exercising ordinary care. That the premises, machinery, and appliances on and prior to July 12, 1892, "were in the aforesaid unsafe condition," and had been constructed and maintained by the defendant "in such condition." That at that day the plaintiff was 18 years of age, and, having just arrived at Merrill from Russia, and being wholly ignorant of the mode of construction of sawmills and of the location of machinery and appliances used therein, and wholly inexperienced in the work in sawmills, and in the use of machinery of any kind, was employed by the defendant to labor in said mill at nighttime, to begin at 6:45 p. m. of that day, and was directed to load timbers at the east end of the mill on carts, and then to push certain other timbers on and along the rollers by the slasher to the east side of the mill, and there throw them from the rollers, and pile them on the floor of the mill. That he began the work of pushing and conveying timbers on and along the rollers about 8 o'clock in the evening of that day. That the defendant well knew of the location of the rollers, the slasher, and the hole in the floor, and that the hole was unguarded; that while in the performance of his duty the plaintiff was obliged to be in close proximity to the hole; that the location of the opening was insufficiently and improperly lighted; that a person not acquainted with the mill could not, in the exercise of ordinary care, notice the same in the nighttime; and that the

plaintiff was a minor, wholly unacquainted with said sawmill, and inexperienced in the work in sawmills or about machinery,—but, notwithstanding such knowledge, the defendant wholly neglected to inform the plaintiff of the condition or existence or location of the opening or of the dangers of working in the place he was obliged to work in as aforesaid, or of any danger connected with the work or premises, and failed and neglected to inform or caution him as to the place he should occupy while performing, or as to the manner of performing, his duty. That the plaintiff was wholly ignorant of the dangers attending such employment, and of the existence or location of said hole; and that on the day aforesaid, while engaged in an attempt to remove a heavy piece of timber from the rollers to the floor of the mill, without fault or negligence on his own part he unintentionally stepped into said opening, before having seen it, and, falling against the slasher, lost two fingers of his left hand. While it is alleged that the opening in the floor of the mill was unguarded, and that the premises, machinery, and appliances were “in the aforesaid unsafe and dangerous condition,” it is not averred that that condition was the result of negligent or faulty construction, and might reasonably have been remedied, or made less dangerous. The negligence charged is a failure properly to light the premises, to instruct the plaintiff where and how to do his work, and to warn him of the dangers incident thereto.

The right of trial by jury is constitutional, and is not to be denied in an action at law where a material question of fact remains in dispute. If there be substantial ground for doubt, the doubt should be resolved in favor of the right. A careful study of the evidence in this record has not enabled us to see clearly that the peremptory instruction was justified. It is not deemed necessary to rehearse the evidence. It leaves room for doubt concerning a number of matters of more or less significance. What was the hour of the evening when the accident happened, how dark was it, what lights above and below the hole were shining, whether the hole was visible, whether the plaintiff had previous knowledge of the hole, whether he knew the proper manner of doing the work in which he was engaged, and how he happened to fall into the opening, are all questions which have been discussed, and upon which it can hardly be said there is no ground for difference of opinion. The plaintiff, in his testimony, gave the following account of the accident:

“After working on the platform, I went up to the slasher, on the south side, near the middle of it. I went to take out the timber piece that was lying there on the rollers. It was 28 to 30 feet long. I started to push it out. I intended to put it on the south side of the rollers. When I started to push I was in front of the rolls, opposite the east end of the slasher, at the point marked ‘H’ on diagram. Then I started to push the westernmost end north, so as to get the other end off in a southerly direction. I went in between the rolls, and struck a hole, and stepped into it with my right foot. I swung around to get my balance, to catch something, and I caught the saw with my left hand. I didn’t know the hole was there. * * * When I started to go in between the rollers I looked all over the floor. I didn’t see any hole. If I see it, I wouldn’t go in it.”

The court's view of the case was expressed as follows:

"I don't think that a verdict could be sustained on this evidence. The prime difficulty with the case is that it doesn't show any substantial neglect on the part of the defendant which caused this accident. It is true that there was a hole there, and that the plaintiff, by some kind of blundering, got into it. The evidence is uniform that there was no necessity for his getting into that hole, and I don't see that there was any more need to caution him against getting into a hole there, four or five feet square, than there was to caution him about getting onto one of those buzz saws in the mill. The danger was open and imminent. It could be seen by anybody, whether they had ever worked in a mill or not. Nobody else had ever got in the hole. He was a young man, and probably green, just from the old country, and wasn't used to the mill; and, if there had been a place that wasn't discoverable by common observation, it would have been the duty of the company to have instructed him, and told him where the hole was. But I think, under all the evidence, that the company had a right to assume that he would have no occasion to stumble into that hole, or go there. That is what the evidence all shows,—that there was no need of his going there, and that his going there was his own carelessness; that he was out of the way, and went there in handling this lumber, where there was no necessity of going. There is no question under the evidence, and his own evidence, but what it was light enough to see the hole to keep out of there. But he was evidently careless, and got in there by his own neglect; and I don't think, if a verdict was given here for the plaintiff, that it could be sustained on the testimony; and it is in as good shape now to try the questions of law as it ever can be."

It is clear enough that there was no necessity for the plaintiff going to the end of the long timber which he was endeavoring to remove from the rollers, and that, if he had taken the proper position, he would not have come near the hole; but if he had not been instructed how to handle the timbers, and did not know or had not been warned of the existence of the hole, it cannot be said, as a conclusion of law, that his going to the end of the timber was an act of carelessness. That he was out of the way in handling the timber, and went where there was no necessity to go, would seem to be beyond dispute; but whether, on that account, he is chargeable with negligence which contributed to his injury, like the question whether the defendant was guilty of negligence which caused the injury, was, we think, a question for the jury.

It is contended, further, that the plaintiff was not a servant of the defendant, but was, at the time of the injury, in the employment of an independent contractor. The question is not without difficulty, both upon the face of the declaration, by reason of averments to which no reference has been made in the statement of the case, and upon the evidence; but the ruling of the circuit court was not based, and the evidence is not deemed clear enough to justify us in upholding it, on that ground. The judgment below is therefore reversed, with direction to grant a new trial.

SHOWALTER, Circuit Judge, did not participate in this decision.

UNITED STATES v. GLEESON.

(Circuit Court of Appeals, Second Circuit. December 7, 1898.)

VACATION OF JUDGMENT—GROUNDS—PERJURED TESTIMONY.

A court will not entertain a suit to vacate or annul a judgment of a court having jurisdiction to render it solely on the ground that it was procured by means of the perjured testimony of the party whom it benefits. *U. S. v. Throckmorton*, 98 U. S. 66, followed.

Wallace, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

This cause comes here upon appeal from a decision of the circuit court, Eastern district of New York, sustaining the demurrer of defendant to the bill of complaint. 78 Fed. 396. The suit is brought by the government, in equity, to procure a decree vacating the certificate of naturalization issued to the defendant by the superior court of the city of New York May 24, 1867, on the ground that the same was procured through false and fraudulent representations, statements, or declarations then made by said Gleeson in his petition to the court to induce it to issue said certificate. The complaint sets forth in detail the sworn statements of Gleeson upon his application, and avers that at the time he thus swore "that he had resided within the United States three years next preceding his arrival at the age of twenty-one years, and that he had resided in the United States for five years, including three years of his minority," he well knew that such statements were false and untrue.

George H. Pettit, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. We have here a suit, the object of which is to vacate, set aside, and annul a judgment of a court having jurisdiction to make such judgment, on the sole ground that defendant induced such court to make such judgment by his own false and perjured testimony. It would seem to be within the rule laid down in *U. S. v. Throckmorton*, 98 U. S. 66, viz. that a "court will not set aside a judgment because it was founded on a fraudulent instrument or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed." This case is cited with approval in *Hilton v. Guyot*, 159 U. S. 207, 16 Sup. Ct. 139. It has been contended that *Marshall v. Holmes*, 141 U. S. 598, 12 Sup. Ct. 62 (a suit arising in Louisiana, the Code of which state apparently authorizes such an action) is so inconsistent with *U. S. v. Throckmorton* that it must be held to have overruled the last-mentioned case. Such is the conclusion apparently reached by the circuit court of appeals in the Seventh circuit in *Graver v. Faurot*, 22 C. C. A. 156, 76 Fed. 257,—a cause which has had an interesting history. See 64 Fed. 241, and 162 U. S. 435, 16 Sup. Ct. 799. The rule of stare decisis, however, leads this court to a different conclusion. Precisely the same question—as to the effect of *Marshall v. Holmes* upon *U. S. v. Throckmorton*—was before us in the case of *Bailey v. Sundberg*, 1 U. S. App. 101, 1 C. C. A. 387, 49 Fed. 583. In that cause the libellant, who had been defeated in an action in rem against a steamship, brought a new action in personam against her owners. This court

held that the decree in the earlier suit precluded Bailey from a re-examination of the same questions in the later suit. Subsequently he amended his libel, charging that, without negligence or laches or other fault on the part of the libelants, the respondent, by his false evidence given in the action in rem, enabled the claimants of the steamship to obtain the judgment therein, which judgment was set up as *res adjudicata*. Exceptions to this amendment were sustained by the district court, and the libel dismissed. Upon appeal to this court the decree of the district court was affirmed upon the authority of *U. S. v. Throckmorton*, no opinion being written. The libellant thereupon twice appealed to the supreme court for a certiorari, upon briefs which presented with very great fullness the apparent conflict between the two cases in 98 U. S. and 141 U. S., and 12 Sup. Ct., and urged upon the consideration of the court that the judges in the Second circuit were following the earlier, rather than the later, decision. Both applications were denied. 145 U. S. 628, 12 Sup. Ct. 239; 154 U. S. 494, 14 Sup. Ct. 1142. Until the attention of this court is called to some decision of the supreme court, other than *Holmes v. Marshall*, criticising or limiting the doctrine of *U. S. v. Throckmorton*, it would seem that the principle of *stare decisis* should preclude its entertaining a bill which seeks to vacate or annul a judgment solely on the ground that such judgment was procured by means of the perjured testimony of the party whom it benefits. The decree of the circuit court is affirmed.

WALLACE, Circuit Judge, dissenting.

UNION CENT. LIFE INS. CO. v. BERLIN.

(Circuit Court of Appeals, Sixth Circuit. November 28, 1898.)

No. 597.

CONTRACT—SEVERANCE—ILLEGAL CONSIDERATION.

An agreement by an agent of a life insurance company to extend a premium note of a policy holder on condition that the latter would pay a personal indebtedness to the agent is indivisible, the condition exacted being the sole consideration for the agreement to extend; and, where such condition was not performed, the fact that it was one the agent had no right to impose, and was illegal, does not render the agreement to extend obligatory or effective to continue the policy in force contrary to its terms, after default in the payment of the note.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

This suit was upon a policy of life insurance issued by appellant on the life of Charles L. Berlin, of Memphis, Tenn., payable to his wife, the appellee. The trial resulted in a judgment against appellant, and to review that judgment this writ of error is prosecuted. The policy was dated February 11, 1895, and the annual premium was \$129.75. As a substitute for cash payment of the first year's premium, four notes were executed by the assured, Berlin, payable to appellant. The first note was due May 15, 1895, and the second July 15, 1895. One of the conditions of the policy was as follows: "The failure to pay, if living, any of the first three annual premiums, or the failure to pay any notes, or interest upon notes, given to the company for any premium, on or before the days upon which they become due, shall avoid and null-

ify this policy without action on the part of the company or notice to the insured or beneficiary; and all payments made upon this policy shall be deemed earned as premiums during its currency. Any and all notes, with their conditions, which may be given for premiums or loans upon the security of this policy, are hereby made a part of this contract of insurance." The notes contained the following provision: "Said policy, including all conditions therein for surrender, or continuance as a paid-up term policy, shall, without notice to any party or parties interested therein, be null and void on the failure to pay this note at maturity, with interest at 6 per cent. per annum, payable annually. In case this note is not paid at maturity, the full amount of premium shall be considered earned as premium during its currency, and the note payable without reviving the policy or any of its provisions." Recovery in the court below was resisted upon the ground that the policy became forfeited by the nonpayment of the second note, falling due July 15, 1895. Berlin died on the 29th of July, 1895. C. E. Tucker was the general agent of appellant at Memphis, and J. B. Marmon was a solicitor and collector employed by Mr. Tucker. Marmon was a personal friend of Berlin, and induced him to apply for and take the policy of insurance sued on. When the note representing the first installment of the annual premium became due, February 15, 1895, Berlin was unable to meet it, and Marmon agreed with him to take care of or pay the note for him, and the amount of the note was charged to Marmon against the sum then due him for work, and was paid, as between Berlin and the company, and this became a debt due from Berlin to Marmon personally. On the 6th of July, before the maturity of the second note, and on the 15th, Marmon called on Berlin, and agreed with him to renew the second note, provided Berlin would pay him one-half of the first note, which had been assumed and paid by Marmon; it being understood, as Marmon says, that Berlin would have to be in good health, or furnish a health certificate indorsed by one of the company's medical examiners. Berlin was, at the time of this interview, sick, though his illness was not thought to be serious. Berlin was to be at his office the day following the 6th, at which time he expected to pay Marmon the amount required in order to secure a renewal of the second note, and it appears that he had procured the money necessary to make that payment, and came to the office the next day, but remained only a short time, returning home before Marmon saw him. Marmon says he impressed Berlin with the importance of paying the amount required in order to renew the second note. After failing to see Berlin on the 7th of July according to appointment, Marmon says he inquired about Berlin from time to time, and, being informed that he was getting along very well, he did not care to be too exacting, and let the matter stand, expecting to see Berlin every day, until the day of Berlin's death, on the 29th. On the 29th of July, Heckle, Berlin's brother-in-law, having ascertained that the second note had not been paid, called to see Mr. Tucker, the general agent, and, finding him absent from the city, tendered the amount of the second note to Marmon, which Marmon declined to receive. This was about 11 o'clock, and about seven hours before the death of Berlin thereafter, on the same day.

The questions made in the court below were the same as those now discussed at bar in this court, and are: First, as to the effect of the verbal agreement made between Marmon and Berlin, July 6th, for a renewal of the second note; second, whether Marmon had authority to make a contract for the renewal of the second note; third, whether or not Marmon, as agent of the company, by the agreement for renewal, may have misled Berlin by inducing him to think that the particular time of payment was not material, on account of which the company would be estopped to rely upon the failure to meet the second note as a ground of forfeiture of the policy. In his instructions to the jury the learned judge treated the questions of contract for renewal and the effect of such contract as questions of law, to be determined by the court, and submitted to the jury the question of authority of the agent to contract for renewal and the question of estoppel.

E. Watkins, for plaintiff in error.

Wm. M. Randolph, George Randolph, and Samuel Holloway, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after making the foregoing statement, delivered the opinion of the court.

In the court below and here counsel for plaintiff in error and defendant in error conceded, and indeed have argued, that so much of the verbal agreement between Marmon and Berlin for the renewal of the second note as required the payment of one-half of the amount due to Marmon personally is contrary to law and invalid, as tending to subserve the personal interests of the agent while acting on behalf of his principal, and as tending to place the agent in a position of antagonism to the best interests of the principal. The law, on grounds of public policy, demands the utmost loyalty from agent to principal at all times, and does not permit the agent, by reason of his personal interests or otherwise, to assume an attitude in conflict with the very best interests of his principal. "The policy of the rule," says Chancellor Kent, "is to shut the door against temptation, and which, in the cases in which such a relationship exists, is deemed to be of itself sufficient to create the disqualification. This principle, like most others, may be subject to some qualification in its application to particular cases; but, as a general rule, it appears to be well settled in the English and in our American jurisprudence." 4 Kent, Comm. (12th Ed.) p. 438, and cases in note.

The principle will also be found stated and applied in cases like *Michoud v. Girod*, 4 How. 554; *Hoffman v. Insurance Co.*, 92 U. S. 161; *Park Hotel Co. v. Fourth Nat. Bank*, 30 C. C. A. 409, 86 Fed. 742; *City of Findlay v. Pertz*, 31 U. S. App. 340, 13 C. C. A. 559, 66 Fed. 427. Counsel, however, while agreeing that the provision of the verbal contract requiring a cash payment to Marmon was invalid, entertain very different views as to the effect of the admitted illegality of this provision of the contract. For plaintiff in error it is insisted that the contract as a whole is illegal, while for the appellee the contention is that the invalid stipulation is to be eliminated from the contract, leaving the remainder of the agreement valid and in itself a complete contract of renewal, although it was contemplated that the cash payment was to be made and a renewal note formally executed.

In this state of the case, we proceed to determine the question thus raised, treating the particular condition requiring a money payment to Marmon as invalid, as has been done throughout the case, both in the court below and in this court. In the charge to the jury the court said:

"I am of the opinion, therefore, and charge the law to be, that if Marmon had the authority to make the agreement, the mere failure to sign and execute the renewal note did not forfeit this policy, but on and after the 15th of July the contract between the insurance company and the policy holder stood precisely as if Berlin had executed and delivered a renewal note according to the terms of the agreement to renew,—that is to say, a new note for the same time, and bearing the same interest, and the same stipulations as to forfeitures and payment of interest, and the payment of the note out of the proceeds of the policy, as are contained in the old note; and, for a more

practical understanding of the matter, I am willing to say that the company held the old note extended by the agreement to renew for the same length of time, according to its stipulations. In other words, the note of July 15th was renewed in fact and extended for the same time the old note bore."

That part of the instruction immediately following this paragraph, to which exception was taken and on which error is assigned, was in this language:

"And I am further of the opinion, and charge the law to be, that the condition precedent attached by Marmon to his agreement to renew, that Berlin should pay a part of the debt he owed him for advances made in his behalf, was a void condition so far as relates to the agreement of renewal, had nothing to do with the insurance company, was not binding on it one way or the other, and Marmon had no right to enforce the condition by refusing to renew the note for noncompliance with it. He had no right to use the stipulations of forfeiture contained in the policy as security for his private debt, and therefore we may lay that condition entirely out of the consideration of this case as immaterial.

"If the court is correct in these rulings, we have the condition existing that on the 15th of July, when the second premium note fell due, it was in fact renewed by the agreement between Marmon and Berlin for a new term, as to time of the same length as the old note, and the day of payment and forfeiture was extended accordingly."

In this instruction there was error. It is obvious that the result of this view would be not to give effect to the contract as actually made and understood by the parties, but to make for them a new and different contract, not contemplated by either party. It is hardly necessary to say that a court cannot make a new contract for parties, nor can it destroy the substance of the one which they have actually made, and at the same time preserve the contract obligation. The courts are without power to absolve men from their legal engagements or to make contracts for them. The condition requiring a money payment to Marmon was the sole consideration for the agreement to renew, and was a material, essential term of such agreement as made, and was indivisible. The promise to renew and the condition requiring payment of the money as the consideration were clearly provisions that were interdependent, the one being the consideration for the other. The test is, did a failure to perform on Berlin's part "go to the root of the whole and substantial consideration for the other party's promise"? The transaction is not one where a good part of the consideration can be separated from that which is bad, and the consideration is neither severable nor apportionable. The contract, being entire, can be enforced only in its entirety, and the failure to perform a material part is a complete discharge of the other party from his obligation to perform. *Dennehy v. McNulta*, 30 C. C. A. 422, 86 Fed. 828, and cases cited; *Cockley v. Brucker*, 54 Ohio St. 214, 44 N. E. 590, and cases cited; *Jones v. U. S.*, 96 U. S. 24; 2 Kent, Comm. (12th Ed.) p. *466; 7 Am. & Eng. Enc. Law (2d Ed.) 95.

It will be observed that, in the result at which the circuit court arrived, the contract to renew the second note was, in effect, declared divisible, the entire consideration on which it rested put aside as illegal and void, and the verbal executory agreement declared obligatory, regardless of the illegal consideration, and also equivalent to a formally executed renewal of the note. The error in the instruction referred

to requires a reversal of the judgment, and we express no opinion upon the other questions discussed, as the evidence on a new trial may be different. For the error indicated the judgment is reversed and the case remanded, with a direction to set aside the verdict and award a new trial.

SMITH v. PITTSBURGH & W. RY. CO.

(Circuit Court, N. D. Ohio, E. D. November 5, 1898.)

No. 5,115.

1. DAMAGES—PERSONAL INJURY TO CHILD—IMPAIRMENT OF PROSPECTS OF MARRIAGE.

Where a personal injury to a little girl is such as to seriously impair her prospects of marriage when she reaches a marriageable age, such fact may properly be considered by the jury as an element of damages resulting from the injury.

2. SAME—PLEADING—SPECIAL DAMAGES.

While the loss of a particular prospect of marriage by a woman must be specially pleaded to entitle it to be considered as an element of damages, the loss of a general prospect of marriage, in the case of a child, by reason of an injury which disfigures her, is a natural, and not a special, consequence of the injury, and may be, and in fact can only be, taken into consideration as an element of general damages, and a special allegation with regard to it is not required.

3. SETTING ASIDE VERDICT — EXCESSIVE DAMAGES — PROVINCE OF COURT AND JURY.

A verdict should not be set aside simply because it is excessive in the mind of the court, but only when the excess is shocking to a sound judgment and a sense of fairness to the defendant. Where there is any margin for a reasonable difference of opinion in the matter, the view of the court should yield to the verdict of the jury, rather than the contrary.

4. RAILROADS—INJURY TO PERSON ON TRACK—TRESPASSERS — PRESUMPTION AS TO RIGHTS IN STREET.

Where a railroad occupies a street with its tracks, the ordinary presumption is that of a joint use by the public and the railroad company; and although the municipal authorities may, under the statute, have power to grant the exclusive right to the use of the street to the railroad company, in the absence of proof of such grant, or of the exclusive use of the street by the company for such a length of time as to give it the right by prescription, a person injured upon the track in the street cannot be regarded as a trespasser.

5. SAME—PERMITTING PUBLIC TO USE TRACK—MEASURE OF CARE REQUIRED.

Even where the track of a railroad is on its private property, if it permits the public, including children, to habitually cross its track at a given point without objection, it is bound, in the operation of its trains, to exercise care with due regard to such probable use, and to the probable danger to persons so using the crossing.

6. SAME—CONTRIBUTORY NEGLIGENCE OF CHILD.

While it is the duty of children to exercise ordinary care to avoid injury, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances.

7. SAME—NEGLIGENT HANDLING OF CARS—INJURY TO CHILDREN.

To permit a loaded railroad car to run down a grade alone on a track laid in a street, without the exercise of any care or attention to see that no children are in danger therefrom, constitutes negligence which renders

the railroad company liable for the injury of a child too young to take care of itself, which was on the track without the fault or negligence of its parents.

On Motion for New Trial.

E. B. Leonard, for plaintiff.

Jones & Anderson, for defendant.

HAMMOND, J. With reluctance, I have concluded to overrule the motion for a new trial. That reluctance grows out of the size of the verdict, and not at all out of any suggested errors of the court in the instructions to the jury, which were as favorable to the defendant as could be reasonably expected, under the proof in the case.

If the plaintiff had been of mature years when the injury occurred, the court might suggest a remittitur, if she chose to accept it, as was done in *Wood v. Railroad Co.*, 88 Fed. 44, and very much for the same reason. But there the brakeman, although without negligence in his own conduct, was consciously engaged in a hazardous employment, and voluntarily occupied a dangerous place. He knew that railroad operatives were often negligent in doing their work, however prudent he might himself be. The child did not. She did not recognize that loaded cars might be turned loose in public streets to crash across the pathway she was following. Therefore, might not the jury be somewhat justified by that circumstance? Or, at least, may not the court be excused, in the absence of any delicate scales for measuring such damages by the jury, in allowing the larger amount to stand in the one case and not the other?

However this may be, there are other reasons which overcome the reluctance to sustain so large a verdict, and mainly because of the fact that the plaintiff here is a girl. It was the almost fatal injury to her prospects of marriage, the chief reliance of woman for advancement in the monetary value of their lives, that influenced the jury, no doubt. The reasoning of the brakeman's case does not apply, therefore, in its premises of fact, to that of a girl similarly injured.

In *Grotenkemper v. Harris*, 25 Ohio St. 510, 514, the supreme court of Ohio, approving the doctrine of *Railroad Co. v. Barron*, 5 Wall. 90, and applying it to the case of the death of a child by the wrongful act of the defendant, in a suit by its next of kin, under the statute of Ohio, uses this language:

"The deceased at the time of his death was a mere infant, and it could not properly be said that his life was of any present pecuniary value to any one; and the only basis upon which damages for pecuniary injury to his next of kin, by reason of his death, could be predicated and allowed, was the one given by the court. If death had not ensued from the injury complained of, there can be no doubt that the party injured, although an infant, could, by his next friend, have maintained an action against the wrongdoers, and have recovered damages commensurate with the injury sustained."

Turning to the action of the trial court, we find that what was thus approved in that case was an "allowance of damages other than such as would immediately and directly follow from the wrongful act of the defendant," and might include, though more difficult of appli-

cation in case of a mere child, such pecuniary benefits as the next of kin "would probably have derived from him in the future." And the jury had been told, in substance, that they must take all the facts and circumstances into consideration, and assess such damages as the next of kin had suffered in view of the future prospects, as they appeared from the then existing circumstances and the ordinary development of such a child. There is not a statute governing this case, but the rules of the common law for measuring the damages were substantially the same where there was no death and the injured party is suing in his own behalf, and the supreme court of Ohio recognizes this in the case cited. And, on this rule, I am unable to see why a girl five years old may not ask the jury to consider what effect the injury of disfigurement will probably have on the prospects of her marriage when she reaches the age of womanhood, and how far the money value of her whole life may be blasted by that circumstance. It is not speculative because it is difficult to estimate, nor in any other sense than almost every element of damages is speculative where the ascertainment depends on what the jury, or other trier of the fact, "shall deem fair and just," and where, being "uncertain and indefinite," the damages are not capable of adjustment "with precision and accuracy," as was stated in the Ohio case. The estimate must be entire, once for all, and hence we cannot wait to see how the unknown adversities or contingencies of the future may affect the question; as if, by some other calamity, those prospects, which we presently estimate, should turn out to have had no existence at all; as if the girl should die before she reaches womanhood; or, having reached it, should find a profitable marriage notwithstanding the disfigurement.

In the case of Ernestine Koch, injured on shipboard, a servant girl, who, among other injuries, received a wound in the forehead, from which a permanent scar resulted that "somewhat disfigured" her, Judge Dedy allowed, as one item, \$500 for the scar, concerning which he uses this language:

"It may be that the sum of \$500 is an insufficient compensation for such a blemish upon the personal appearance of the libellant. But it does not appear that the scar will affect her personal appearance, so as to make her presence offensive or painful to others," etc.

And then he says this:

"Still the scar will be a permanent disfigurement of her person, for which she is entitled to some compensation. *Karr v. Parks*, 44 Cal. 49. In this country, at least, it is still open to every woman, however poor or humble, to obtain a secure and independent position in the community by marriage. In that matter, which is said to be the chief end of her existence, personal appearance—comeliness—is a consideration of comparative importance in the case of every daughter of Eve." *The Oriflamme*, 3 Sawy. 397, Fed. Cas. No. 10,572; 3 Suth. Dam. 268; 1 Suth. Dam. 765.

There are other familiar instances where loss of marriage prospects are elements of damage, as in seduction, breach of promise (for the particular loss by that breach of contract), slander or libel (under some circumstances), and sometimes of false representations amounting to a distinct and actionable injury. *Cooley*, Torts, 277; 3 Suth. Dam.

323. An injury to the person of a woman affecting her prospects of marriage should be as actionable as one to her character.

The petition in this case does not specially plead any loss of marriage prospects, but in a case like this it is difficult to see why there should be any special plea. It is said by Mr. Sutherland that special damages are required to be stated in the declaration, and that an unmarried woman cannot secure damages on account of her prospects of marriage being lessened by the personal injury for which she sues, unless such special damage be alleged; for which he cites *Hunter v. Stewart*, 47 Me. 419; 1 *Suth. Dam.* 763, 765; 3 *Suth. Dam.* 268, and note. Not having an opportunity of examining that case to see the age of the woman, its bearing is not fully understood. But presumably it was a woman, and not a child of five years of age, as to which it could hardly be said that she could truthfully set up any special plea or averment as to a loss of marriage; and, therefore, presumably the case, and all like it, would fall within the general rule of pleading that damages not following directly as a consequence of the particular circumstances must be specially pleaded. The loss of a particular prospect of marriage must be specially pleaded, no doubt, but why should the loss of the general prospect belonging to a child whose injury so disfigures her as to make marriage almost impossible? It would seem rather to fall within the rule of the Ohio case above cited, as applicable to a girl's prospects in the future, although a mere infant now; and, generally, within the doctrine that such a loss is a natural consequence of the injury, and not a special consequence, very much like the loss to growing crops, which may be compensated in damages. *Suth. Dam.* 158, 187, 193-198.

It would be agreed by all that the injury to this plaintiff does seriously impair her prospects of marriage when she reaches the marriageable age, and I had no hesitation in holding that such impairment is an element of damage for the consideration of the jury. It is not more likely to unduly influence a jury, nor is it more difficult of estimation, than any other element of damages confessedly within their consideration when a mere child is injured, nor at all unlike most of the elements of calculation or estimation in all cases of personal injury. It all depends on the fair judgment of the jury, and is especially subject to the scrutiny of the court and its power to control excessive verdicts, as was said by Cresswell, J., in *Smith v. Woodfine*, 1 C. B. (N. S.) 660, in a somewhat analogous estimation of damages without the aid of a precise rule. 3 *Suth. Dam.* 323, and note; *Id.* 289; 1 *Suth. Dam.* 810.

Mr. Justice Story, in the leading federal case on the duty and power of the court to control the verdict by compelling a remittitur of excessive damages, under the penalty of a new trial, describes the perplexity of every judge called upon to exercise the power in language that will guide and comfort him quite as well as any enunciation on the subject. He says:

"As to the question of successive damages, I agree that the court may grant a new trial for excessive damages. So far as the contrary doctrine may be supposed to be maintained by *Duberley v. Gunning*, 4 Term R. 651, it has been qualified or overturned in *Chambers v. Caulfield*, 6 East, 244, and *Hewlett*

v. Cruchley, 5 Taunt. 277. It is indeed an exercise of discretion full of delicacy and difficulty. But if it should clearly appear that the jury have committed a gross error, or have acted upon improper motives, or have given damages excessive in relation to the person or the injury, it is as much the duty of the court to interfere, to prevent the wrong, as in any other case. In the present case there were many aggravating circumstances, and certainly the defendant had no cause of action. It appeared to me at the trial to be a strong case for damages. At the same time, I should have been better satisfied if the damages had been more moderate. I have the greatest hesitation in interfering with the verdict, and in doing so I believe that I go to the very limits of the law," etc. *Blunt v. Little*, 3 Mason, 102, Fed. Cas. No. 1,578.

This has often been approved by other courts, and by the supreme court of the United States. *Railroad Co. v. Herbert*, 116 U. S. 642, 647, 6 Sup. Ct. 590; *Cattle Co. v. Mann*, 130 U. S. 69, 9 Sup. Ct. 458, where Mr. Justice Harlan carefully refutes the contention that the exercise of the power is unconstitutional, and points out the distinction between remitting in a case where excess is the only infirmity of the verdict, and granting a new trial where the excess indicates that the jury have been guilty of the misconduct of partiality, or indifference to the evidence, or to the case of the defendant, so that their verdict is tainted with the suspicion that they may have altogether ill-considered it, or negligently and imperfectly discharged their duty, not only as to the amount of damages, but in other respects. And Mr. Justice Gray, in *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696, declares another limitation on the power when it is held that the court cannot arbitrarily fix a sum and enter a verdict for it, but must leave a free choice to the plaintiff of remitting or taking a new trial. So, the excess of a verdict may sometimes be remitted in the appellate court. *Railroad Co. v. Harmon's Adm'r*, 147 U. S. 571, 13 Sup. Ct. 557.

Guided by these cases, I have concluded to let the verdict stand, notwithstanding my own dissatisfaction with its amount. Otherwise it is all it should be. There can scarcely be a more flagrant act of negligence than that of running a loaded car, without proper control, down a steep grade, in the street of a town, and apparently without the least concern for any injury it may do to persons in the street, or who may be in the street, for all the operatives know. The movement should have been safeguarded in some way; at least by some preliminary observation of the track before the car is turned loose, made then and there, to see that no one is in the way. This little girl happened to be passing, or lingering, it may be, with child-like play, in the place of danger; and the operatives, unconsciously, no doubt, but none the less negligently, without any outlooking whatever, abandoned the car, of which they had lost control, and it drove another car over the child, crushing her leg so that she has lost it. Now I do not for one moment, in sustaining this verdict, harbor the idea of punishing the company for this negligence of its servants, reprehensible as it was, but the statement is made to show how utterly the verdict is bare of any other possible infirmity than that of whatever excess there may be in it. The jury was told that it was *not* a case for punitive damages, and cautioned against resent-

ment at the carelessness; also the question of the child's own discretion and negligence was submitted to the jury, it being admitted of record that the mother was not negligent in allowing it to be on the street; and the question of the negligence of the train hands was submitted to the jury.

The defense most relied on was that the child was a trespasser, of which something will be said hereafter; which being ruled against the defendant company, the jury had no other issues than those above indicated, and decided them all properly, except that they gave a larger compensation than the court would have given if trying that fact. To illustrate my action here, I may properly suggest that, in my view of the facts concerning the child and her injury, about \$7,000 would have been a reasonable compensation. But can the court say that the allowance of \$10,000 was error of judgment "in relation to the person or injury" on the part of the jury? In a certain sense, I feel that this question might be answered in the affirmative; and yet, in the sense that the court must respect the verdict of the jury, in fact as well as in pretense or theory, and must not interfere to substitute its own judgment for that of the jurors,—thereby violating a constitutional privilege to have the fair verdict of a jury, and not the fair estimate of the court,—I say, in that sense, I am constrained to answer the question in the negative. A crippled woman is in a worse condition than a crippled man. To say nothing of the immense loss to her in the matter of personal attractiveness in respect of her chances of marriage, always her main reliance for a support in life, the infirmity lessens her feebler powers of meeting the demands upon physical exertion below the degree of impairment resulting to a man. The effect on her spirits and courage is more depressing, she feels the loss more than a man, and shrinks from the exhibition of her infirmity that is necessary to overcome its hindrances. Then there are the ordinary elements of physical and mental suffering, now and forever during her life, so far as mental suffering goes, to be reckoned by the jury. No doubt they felt that the child should be liberally compensated, and I am unwilling to disturb their verdict, simply because I believe it is their honest verdict, not so far wrong in amount as to demonstrate miscalculation or idle estimate, and certainly not passion or prejudice. I should not feel, as Mr. Justice Story did, that I was safely within the limits of the law, if I imposed the penalty of a new trial on the plaintiff by asking a remittitur.

I have extended this opinion in order to explain, as best I may, the considerations that have controlled that discretion imposed by law upon the court in dealing with a verdict that does seem excessive, and yet which I cannot conscientiously, and commendably to my own intelligence, disturb. A verdict should not be set aside simply because it is excessive, in the mind of the court, but only when the excess is shocking to a sound judgment and a sense of fairness to the defendant. Where there is any margin for a reasonable difference of opinion in the matter, the view of the court should yield to the verdict of the jury, rather than the contrary.

The next most important ground for a new trial is the contention,

made vigorously at the trial as now, that the plaintiff was a trespasser. There is, in my judgment, not the slightest foundation for this position. It depends wholly upon a bare assumption of an exclusive right to the street on which the tracks were laid. There is not a particle of proof of it. If that exclusive right exists, it could be readily proved. What does it matter that the city has power, under the statutes of Ohio, to grant an exclusive right to a railroad company to use the street, if the grant has not been made? If it has been made, there should be an ordinance, a contract, or some other muniment of the fact; or, if there be some other sufficient grant, no matter what or how, we should have been furnished with the proof of it. We are asked to treat the child as estray upon the company's private grounds, where there was no obligation to look out for her, unless her presence and danger were known at the time, upon not a whisper of proof from any witness, nor the production of any document. Why? Upon a suggestion in argument that, in the absence of all proof, the presumption is that of a grant of an exclusive right to the use of the street. The court charged the jury that the ordinary presumption is that of a joint use by the public and the company until there should be proof of some kind to the contrary,—either of a grant of some larger use, or, possibly, proof of a long-continued exclusive use, by prescription, as it were, or otherwise. I adhere to this. If such exclusive use existed as a fact, or if there were a subsisting right to it, it would not have been left to any presumptions, even where possibly they might operate, but the best proof, the grant itself, would be forthcoming, or else proof aliunde of the facts necessary to establish it. The circumstances here do not indicate any necessity for presumptions or a reliance upon them, and the contention seems altogether gratuitous.

But, more than this, if the right of use were exclusive, there was proof in this case that the public had been allowed to pass over and along the street, or private right of way, if you please, constantly, and without the least restraint, as if it were still a street and a joint use existed. In the case of *Harriman v. Railroad Co.*, 45 Ohio St. 11, 12 N. E. 451, it was held that:

"Even where the structures of the railroad company were on its private property, and it for a long time permits the public, including children, to travel and pass habitually over its road at a given point without objection or hindrance, it should, in the operation of its trains and management of the road, so long as it acquiesces in such use, be held to anticipate a continuance thereof; and it is bound to exercise care accordingly, having due regard to such probable use, and proportioned to the probable danger to persons using its road."

The verdict of the jury is conclusive on the question of the child's own want of contributory negligence, and it is well supported by the facts as applicable to a child so young as five years. The defendant disclaimed on the record any blame of the parents. *Railroad Co. v. Stout*, 17 Wall. 657, 660. There remained, then, only the question whether the child was of discreet judgment, and able to take care of itself, under the circumstances, and whether it was chargeable with negligence under the circumstances, including that of its tender years. These were issues properly submitted to the

jury, in my judgment, and the cases supporting the instructions given on the subject were cited in the charge itself, and largely quoted to the jury. *Railroad Co. v. Stout*, 17 Wall. 657; *Railroad Co. v. McDonald*, 152 U. S. 262, 278, 14 Sup. Ct. 619; *Rolling-Mill Co. v. Corrigan*, 46 Ohio St. 283, 291, 20 N. E. 466; *Harriman v. Railroad Co.*, 45 Ohio St. 11, 12 N. E. 451.

The supreme court of Ohio and that of the United States are in accord on the subject of the negligence of children, whatever conflict there may be elsewhere; and the sound rule was quoted from that of Ohio, as follows:

"In the application of the doctrine of contributory negligence to children, * * * their conduct should not be judged by the same rule which governs that of adults; and, while it is their duty to exercise ordinary care to avoid injuries of which they complain, ordinary care for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances." *Rolling-Mill Co. v. Corrigan*, *supra*.

The plaintiff was at that time five years old. Her mother had admonished her from straying away from home and going across the railroad track, and had punished her for it. On this occasion she had gone out alone, but unknown to the mother, and inferentially, possibly, she stopped to play at a sand pile close to the track, though the proof of her movements is very meager. The whole matter was left to the jury, and they find she was not negligent, according to her age, and not appreciative of her danger because of her age.

There was not in the proof a suggestion that the operatives knew of her presence, or had any ground of suspecting it, further than the fact that the people thereabouts, including children, constantly used the pathway across the street and the railroad tracks in going to and fro. The court charged the jury that they did not, under the circumstances, owe any particular duty to this particular child on this particular occasion, but that they owed a general duty to all the children of the public that might be found using, straying upon, loitering, or playing in the streets; but that it was only such care as should be taken by ordinarily prudent and careful men, under like circumstances, for the purpose of their reasonable protection; and the test of ordinary care, as proven by that which ordinary usage in the business demands, was given from *Titus v. Railroad Co.*, 136 Pa. St. 618, 626, 20 Atl. 517. This instruction was applied to the facts, and the jury were told that when loaded cars were left to run on the street alone, before the movement began or became dangerous, some attention should be had to seeing that children were not in the way or in danger. There was absolutely no attention in this case, but the maneuver of sending the car down the grade was undertaken in the apparent reliance that every one in the way or in danger would get out and prudently take care of themselves. This ordinarily may be a safe reliance as to adults and older children, but not as to those too young to take care of themselves; and while such very young children, perhaps, are not often astray, sometimes they are, and if the parents are not negligent, and they are not of discreet mind themselves, the risk of injury is wholly with the railroad operatives who

are using the streets to handle their cars. Possibly railroad operatives never think of this liability to stray children, too young to keep out of the way, but nevertheless it exists; and the ever-present defense or reliance upon contributory negligence must fail them, if the jury find that the child is too young to be accountable for any negligence there may be about its being in dangerous places. This liability is not confined, as counsel suggest, to cases where the company does not guard sufficiently places of danger, like a turntable, enticing to children as a plaything and playplace, but is of universal application, and applies, according to circumstances, of course, to the protection of children from the culpable negligence of others. It must be so, or children who cannot take care of themselves, because they are unconscious of danger, would be the victims of negligence, without right or hope of redress. Their lives would be unprotected, wholly, if this were not so. I am satisfied with the charge of the court on that subject as altogether sound. Not being a trespasser, the plaintiff was entitled to that protection which is above indicated. Motion overruled

DAVIS v. DAVIS.

(Circuit Court, D. Massachusetts. December 8, 1898.)

1. DEPOSITIONS—SUBPŒNA DUCES TECUM.

A subpoena duces tecum may properly be issued against a deponent whose testimony is taken under Rev. St. § 863.

2. SAME—FEDERAL STATUTE—POWER TO TAKE OUTSIDE OF DISTRICT.

Under Rev. St. § 863, a witness may be required to appear and submit to an examination outside the district in which the suit is pending.

3. ATTORNEY AND CLIENT—ATTORNEY'S LIEN ON PAPERS OF CLIENT—SUBPŒNA DUCES TECUM.

An attorney, having a lien on papers of a former client in his possession for unpaid fees, cannot be compelled to produce such papers by a subpoena duces tecum issued on behalf of the client.

4. SAME—PROCEEDINGS FOR CONTEMPT.

A court will not ordinarily determine the validity of an attorney's lien, unless by consent, in summary proceedings for contempt against the attorney for refusing to produce papers of the client in his possession in obedience to a subpoena duces tecum.

In re Petition for Subpœna Duces Tecum to Robert M. Morse.

Richard W. Hale, for petitioner.

Hosea M. Knowlton, for R. M. Morse, witness.

LOWELL, District Judge. The plaintiff brought a suit at law in the circuit court of the United States for the district of Montana. Desiring to examine Mr. Morse, a resident of this district, and to procure the introduction in evidence of certain papers in Mr. Morse's possession, he obtained a writ of subpoena duces tecum addressed to Mr. Morse, commanding him to appear before Mr. Fiske, a notary public, in Boston. Mr. Morse appeared duly before the notary, and deposed, but declined to produce the papers called for; which papers, it is admitted, were competent evidence in the suit pending in Montana. This is a proceeding against Mr. Morse for contempt.

The witness contended, first, that no subpoena duces tecum could properly issue against a deponent under the provisions of section 863 of the Revised Statutes, but that, if it be desired to obtain a subpoena duces tecum to a deponent, the applicant therefor must take out a dedimus potestatem under section 866. The contrary has been ruled in an elaborate opinion by Judge Choate in the circuit court for the Southern district of New York (*U. S. v. Tilden*, Fed. Cas. No. 16,522), and I agree with him. See, also, *Lowrey v. Kusworm*, 66 Fed. 539. I have had greater difficulty in determining if, under the provisions of section 863, a witness can, under any circumstances, be compelled to appear before a notary outside the district in which the suit is pending. Since the case of *Insurance Co. v. Southgate*, 5 Pet. 604, a deposition of a witness voluntarily appearing, if taken outside the district, has been admitted; and in several cases in the circuit court the right, under section 863, to compel a witness to appear and submit to examination outside the district has been decided or implied without doubt. See *Ex parte Judson*, 3 Blatchf. 89, Fed. Cas. No. 7,561. I hold, therefore, that the subpoena was properly issued.

The witness refused to produce the papers called for, because he claimed a lien upon them, as having once been counsel for the plaintiff. The plaintiff, while admitting that an attorney has a lien for his services upon papers deposited with him by his client, yet contends that that lien will not justify the attorney's refusal to produce those papers if he be summoned as a witness in any suit. I have been referred to but few cases bearing upon the right of a lawyer claiming a lien to refuse to produce papers for inspection when he has been summoned as a witness; but in *Hope v. Liddell*, 7 De Gex, M. & G. 331, the lords justices held that a lawyer summoned by a subpoena duces tecum could not refuse to produce in court documents upon which he claimed a lien, if the party demanding their production was not the person against whom the lien was claimed. In his opinion Lord Justice Knight Bruce carefully refused, however, to express any opinion upon the case in which the debtor was the person seeking production, while Lord Justice Turner implied pretty strongly that in such case the right to have the documents produced did not exist. That the debtor cannot require his former counsel to produce papers upon which the latter claims a lien is also implied or asserted in *Re Cameron's Coalbrook, etc.*, Ry. Co., 25 Beav. 1, and in *Brassington v. Brassington*, 1 Sim. & S. 455, and the point was expressly ruled at nisi prius by Lord Chief Justice Denman in *Kemp v. King*, 2 Moody & R. 437. The exception to the general rule of production seems to me a reasonable one. That an attorney's lien on his client's papers should not be permitted to embarrass a third person in no way liable for the debt is reasonable, but, if an attorney's lien upon his client's papers amounts to anything, I think he may assert it as against the client, even when summoned by him to produce the papers by a subpoena duces tecum. The value of the lien often lies almost altogether in the power to withhold the papers from use as evidence, and that the debtor client should be allowed by a subpoena duces tecum to make practically worthless his creditor's lien seems to me unjust. If an attorney's lien is valid to defeat his client's writ of subpoena, I do not think that in this case I

ought to try, upon summary process, the validity of the particular lien claimed by Mr. Morse. See *Cobb v. Tirrell*, 141 Mass. 459, 5 N. E. 828; *Leszynsky v. Merritt*, 9 Fed. 688. *White v. Harlow*, 5 Gray, 463, was decided "upon the precise facts developed by the bill of exceptions," and, so far as appears, the witness made no objection to the determination of the validity of his lien in the principal case. Without deciding that in no case would it be proper to determine the validity of the attorney's lien upon summary process like this, I think it is not proper to do so here.

In re BOONE.

(Circuit Court, N. D. California. December 12, 1898.)

No. 12,455.

ATTORNEYS—DISBARMENT—READMISSION TO PRACTICE.

A judgment of disbarment does not preclude the court from afterwards readmitting the disbarred attorney to the bar of the court upon his full acquiescence in such judgment, and for reasons and upon assurances satisfactory to the court.

On motion of S. C. Denson for the readmission of John L. Boone as an attorney and counselor of the court.

S. C. Denson, for the motion.

Crittenden Thornton, for petitioner A. B. Bowers.

MORROW, Circuit Judge. The petition of John L. Boone, presented to the court by Judge S. C. Denson, on a motion to readmit the petitioner to practice as an attorney and counselor of this court, shows that on the 23d day of July, 1877, the petitioner was duly and regularly admitted to practice as an attorney and counselor of this court; that for 20 years thereafter, and up to and about the 23d day of December, 1897, he was a member of the bar of this court, and had and enjoyed a large practice before the court, and was recognized both by the bench and bar of this court as an honest, upright, and successful attorney; that on the 16th day of August, 1897, A. B. Bowers filed a petition in this court charging that petitioner had committed an unprofessional act, in seeking to be retained against him in a case where the petitioner had been the former attorney of said Bowers, and in charging that a decree which had been obtained from this court by said Bowers while the petitioner was acting as his attorney had been obtained by fraudulent means; that Bowers in his said petition asked that the petitioner be disbarred from practicing in this court; that, after a hearing of said matters, an order was, on the 23d day of December, 1897, made and entered by this court, perpetually disbarring petitioner from practicing in this court. The petitioner shows that he is 56 years of age, and has a large family dependent upon him for education and support; that he has spent most of his life in the practice of his profession, principally in this court, and in his special line of practice he is compelled to practice in this court, or cease his practice entirely; that he has no other business or occupation, and, unless he is permitted to resume his practice in this court, his family

will suffer, and both he and they will be remitted to penury and want; that he has expended a large portion of his life earnings in the purchase of a law library, suitable for his line of special practice, all of which must be sacrificed and useless unless he be permitted to resume his practice in this court. The petitioner further states that he fully and freely, and without reservation, accepts the law and the facts as stated in the opinion of the court disbarring him, and confesses that he committed an infraction of the rules there set out, and that he throws himself upon the mercy of the court. He further promises that, should he be reinstated by the judges of this court, he will in future observe the law as laid down in the said decree disbarring him, and will in all respects act honestly and uprightly. This petition is accompanied by another, signed by 200 members of the bar of San Francisco, representing that they and each of them have been acquainted with Mr. Boone for many years, and have always found him to be an upright, conscientious, and capable attorney, and they recommend his reinstatement as an attorney of this court.

It will not be necessary to review the proceedings in the action for disbarment. They are fully stated in the opinion of the court in *Re Boone*, 83 Fed. 944.

The supreme court of this state, in passing upon the petition for the restoration of W. B. Treadwell to the roll of attorneys (114 Cal. 24, 45 Pac. 993), held that:

"An order or judgment of disbarment is not necessarily final or conclusive for all time, and does not preclude the court, for good cause, from setting it aside, and restoring the delinquent attorney."

It is perhaps beyond the power of this court to set aside a judgment of disbarment entered at a prior term of the court; but it is not perceived why the petitioner may not be readmitted as an attorney of this court if he possesses the qualifications required by rule 1 of the court. That rule provides:

"No person shall be admitted to practice as an attorney or counselor in this court, unless he shall have been previously admitted in the supreme court of the United States, or the supreme court of this state, or the highest court of a sister state, or of an organized territory of the United States. Satisfactory evidence of good moral character will be required. The applicant, upon his admission, shall sign the roll of attorneys and counselors, and take and subscribe the following oath, to wit: 'I solemnly swear (or affirm) that I will support the constitution of the United States; that I will bear true faith and allegiance to the government of the United States; that I will maintain the respect due to the courts of justice and judicial officers; and that I will demean myself as an attorney and counselor of this court uprightly.'"

The petitioner is a member of the bar of the supreme court of this state, and has produced as evidence of his good moral character the indorsement of the leading members of the bar of San Francisco that he is worthy to be readmitted to the bar of this court. The judgment and proceedings against the petitioner in the action for his disbarment would, under ordinary circumstances, be a sufficient answer to a petition for his reinstatement; but the fact that the petitioner has fully and freely admitted the correctness of the judgment of the court in that matter, and has promised, if readmitted, to faithfully observe all the duties and obligations of an attorney and counselor of the

court, commends his petition to the consideration of the court, notwithstanding that judgment. The motion, as presented in court by a leading member of the bar, and the assurance with which it has been supported, appear, under all the circumstances, to justify the court in giving it favorable consideration. It is therefore ordered that John L. Boone be admitted as an attorney and counselor of this court upon taking the usual oath.

SAMUEL SCHIFF & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. December 16, 1898.)

No. 2,180.

CUSTOMS DUTIES—CLASSIFICATION—STRUNG BEADS OF METAL AND GLASS.

Strung beads of glass, metal lined or coated, the metal being of chief value, are dutiable under paragraph 215 of the tariff law of 1890, as manufactures of metal not specially provided for, and not under paragraph 108, as manufactures of which glass is the component of chief value, not specially provided for.¹

This is an appeal by Samuel Schiff & Co. from a decision of the board of general appraisers affirming the classification for duty of certain imported merchandise.

Albert Comstock, for importers.

J. T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge. The evidence shows, without dispute, that the goods concerned herein are strung beads of metal and glass,—metal chief value. The glass composes the basis or body of the bead, the metal being afterwards laid on as a coating or lining. They were imported under the act of 1890, and were classified for duty at 60 per cent. ad valorem, as manufactures of glass, or of which glass shall be the component of chief value, not specially provided for, under paragraph 108 of that act; there being no specific provision for beads, except when unstrung. Paragraph 445. The importers claim that these beads are dutiable at 45 per cent. ad valorem only, as manufactures of metal, under paragraph 215 of said act. Not only does the evidence sustain this claim, but the general appraisers have in a number of their decisions held that such metal lined or coated beads, and the trimmings composed of them, were dutiable at 45 per cent., under the paragraph cited by these appellants. All other claims in the protest having been abandoned by the importers in open court, the claim at 45 per cent. ad valorem, under paragraph 215 of said act, is sustained. The decision of the board of general appraisers is reversed.

¹ For classification of goods for payment of duties generally, see note to *Dennison Mfg. Co. v. U. S.*, 18 C. C. A. 545.

OPPENHEIMER v. UNITED STATES.

(Circuit Court, S. D. New York. December 13, 1898.)

No. 2,134.

1. CUSTOMS DUTIES—CHANGE OF LAW—DATE OF IMPORTATION.

Where goods were entered on August 27, 1894, but were in the custody of the government on the 28th, they must be treated as imported on the 28th, and are dutiable under the act of August 27th.

2. SAME—MANUFACTURES OF WOOL—GOODS OF MOHAIR.

Goods made of mohair yarn, which is made from the hair of the Angora goat, imported on August 28, 1894, are subject to duty under the tariff act of August 27, 1894. Such articles cannot be considered as manufactures of wool, on which the reduction of duties made by such act were postponed, though the material is known commercially as "ice wool," in view of the fact that it has been separately provided for in several tariff acts.

This is an appeal by H. Oppenheimer from a decision of the board of general appraisers affirming a classification for duty of certain imported merchandise.

Stephen G. Clarke, for importer.

J. T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The articles in question are shawls, commercially known as "ice-wool squares or shawls," made of ice wool or mohair yarn, which yarn is made from the hair of the Angora goat. It appears that while the goods were entered at the port of New York on August 27, 1894, they were actually in the custody of the United States government on August 28th; and therefore, as to this branch of the case, the court is governed by the rule laid down in *U. S. v. E. L. Goodsell Co.*, 28 C. C. A. 453, 84 Fed. 439, and the goods must be treated as imported on August 28, 1894. The collector classified the articles for duty under the act of 1890, before the Goodsell decision, supposing at that time that the goods had actually been imported on August 27th.

The first contention of the government is that these articles are made of wool, because the material is commercially known as "ice wool"; but I do not think this contention is supported, in view of the fact that these words are often used without any such signification, as in the case of articles commercially known as "mineral wool," "cotton wool," or "ice cream." It may be true, as contended by counsel for the government, that in common meaning and speech the mohair, or hair of the Angora goat, is not differentiated from wool; but in view of the fact that this hair has been separately provided for in various tariff acts, in view of the contemporaneous and subsequent construction of this act by the board of appraisers at the port of New York, and especially in view of the reasoning of the court in the case of *U. S. v. Klumpp*, 169 U. S. 209, 18 Sup. Ct. 311, it cannot be assumed that congress intended to postpone the reduction of the rates of duty on manufactures of the hair of the Angora goat; and the decision of the board of appraisers is, therefore, reversed.

WORTHINGTON et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 16, 1898.)

No. 1,792.

1. CUSTOMS DUTIES—CLASSIFICATION—METALLIC PINS.

Fancy pins, with metal shafts, and metal, glass, or paste heads, are dutiable under paragraph 206 of the tariff law of 1890, as "pins, metallic," and not under paragraph 108, as "manufactures of which glass is the component of chief value, not specially provided for"; paragraph 206 containing no exception of "pins otherwise provided for."

2. SAME—HAT ORNAMENTS OF PASTE.

Millinery or hat ornaments composed chiefly in value of paste, in the form of so-called "Rhinestones," their remaining material being metal backs and frames to hold the paste stones, are dutiable under paragraph 459 of the tariff law of 1890, as manufactures of which paste is the component of chief value, not specially provided for, and not under paragraph 108, as manufactures of which glass is the component of chief value, not specially provided for, nor under paragraph 452, as articles of jewelry.

This is an appeal by Worthington, Smith & Co. from a decision of the board of general appraisers in affirming the classification for duty of certain imported articles of merchandise.

Albert Comstock, for importers.

J. T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge. The evidence in this case shows without dispute that the merchandise covered herein, which was imported under the tariff act of 1890, consisted of fancy pins, with metal shafts, and metal, glass, or paste heads, and of millinery or hat ornaments, composed chiefly in value of paste, in the form of so-called "Rhinestones"; their remaining material being metal backs and frames to hold the paste stones. Duty was assessed on all these goods at 60 per cent., as manufactures of which glass is the component of chief value, not specially provided for, under paragraph 108 of the act in question. The importers claim that the pins were dutiable at 30 per cent. only, under paragraph 206, as "pins, metallic," irrespective of the component of chief value, and that the other articles were dutiable at 25 per cent. only, under paragraph 459, as manufactures of which paste is the component of chief value, not specially provided for. It was decided by this court in *U. S. v. Wolff*, 69 Fed. 327, that pins with metal shafts were "pins, metallic," in the sense of paragraph 206, and the evidence in the present case fully supports that conclusion. As the paragraph is unqualified by any exception of such pins "otherwise provided for," all such are dutiable thereunder, however much they might otherwise meet the provisions of paragraph 108, or any other part of the act.

As to the other articles, the proof shows that they are not composed in any part of glass, except in such sense as "paste" may be glass; the evidence showing that paste is the component of chief value. But congress has long discriminated between paste and glass in tariff acts, and the provision cited by the appellants is, as between that and paragraph 108, the only one applicable to the goods under discussion. If, however, these articles are jewelry, there is a paragraph (452) which

more specifically provides for them, at 50 per cent., than does "manufactures of paste not specially provided for." The common acceptance of the term "jewelry" would not include a paste buckle to be sewn into the trimmings of a hat. The evidence in this case shows that these millinery ornaments are for such use, and are of too cheap and fragile a character to be much handled, or constantly removed and replaced, as is the practice with jewelry. Furthermore, it shows that in the wholesale millinery trade, to which these articles pertain, they are never known commercially as "jewelry," as paragraph 452 requires that articles should be, in order to come within it. Therefore there is no paragraph of the law applicable to these articles, except No. 459, cited by the appellants. Paste and metal "cabochons," articles of the same class and materials, were held dutiable as unenumerated manufactures of which paste was chief value, by the circuit court of appeals in *U. S. v. Field*, 29 C. C. A. 458, and 85 Fed. 862. The decision of the board of appraisers is reversed, and it is held that the pins are dutiable at 30 per cent., under paragraph 206, and the other articles at 25 per cent., under paragraph 459, both of said act.

UNITED STATES v. SEHLBACH et al.

(Circuit Court of Appeals, Second Circuit. December 7, 1898.)

CUSTOMS DUTIES—CLASSIFICATION—ALIZARINE BLUE.

Alizarine blues, commercially known as such when introduced into this country, though not known in the commerce of the country until after the passage of the tariff act of 1890, are free of duty thereunder, as members of the class of dyes called "alizarine blues," made duty free by paragraph 478.¹

Appeal from the Circuit Court of the United States for the Southern District of New York.

James T. Van Rensselaer, for the United States.

Edward Hartley, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In November and December, 1893, the firm of E. Sehlbach & Co. imported into the port of New York three kinds or shades of a dye entered as "alizarine blue," known, respectively, as "alizarine blue 5 R.," "alizarine blue C. W. R. R.," and "alizarine blue C. W. R. B." The collector classified each as a coal-tar color, under paragraph 18 of the tariff act of October 1, 1890, which is as follows: "All coal tar colors or dyes, by whatever name known, and not especially provided for in this act, thirty-five per centum ad valorem." The importers protested against this classification upon the ground that the dyestuffs in these importations were commercially known as "alizarine blue," and were in the free list, and duty free, under paragraph 478 of the same act, which is as follows: "Alizarine, natural or artificial, and dyes commercially known as alizarine

¹ For classification of goods for payment of duties generally, see note to *Dennison Mfg. Co. v. U. S.*, 18 C. C. A. 545, 72 Fed. 258.

yellow, alizarine orange, alizarine green, alizarine blue, alizarine brown, alizarine black." The board of general appraisers sustained the collector upon the ground that these dyes were not commercially known on and prior to October 1, 1890, by any of the names mentioned in paragraph 478. Upon appeal, the circuit court reversed the decision of the board, and this appeal was taken by the United States from the decision of the circuit court. 78 Fed. 803.

The coloring matter or dye which was many years ago known as "alizarine" was obtained from madder root. After the discovery of the properties of coal tar, what was known as "artificial alizarine" was obtained from anthracene, a product of the distillation of coal tar; and, by the aid of chemical science and investigation, dyes which produced different colors and different shades of the same color were discovered from time to time, and the production of dyes from coal tar became an industry of large importance, because very beneficial in the manufacture of various kinds of fabrics. The artificial alizarines derived from coal tar were not absolutely chemically the same as those originally derived from the madder root, but for all practical purposes were the same. As alizarines became commercially divided into natural and artificial, and also subdivided into dyes producing different shades of color, the tariff legislation of the country, which in 1872 (17 Stat. 236) made the extracts of madder free of duty, was correspondingly enlarged so as to be adapted to the change in the origin and characteristics of this class of dyes. In 1875 (18 Stat. 309) all alizarine was made free, and in 1883 (22 Stat. 516) "alizarine natural or artificial" was declared free; and in the act of October 1, 1890, not only alizarine, natural and artificial, but the dyes, whether or not technically alizarine in constitution, if commercially known as the alizarine colors named in paragraph 478, were placed in the free list (26 Stat. 603). Prior to 1890 a dye commercially called "alizarine blue," which was a derivative of alizarine and a blue dye, was sold in this country. In 1889 and 1890 the true alizarine colors called "alizarine blue C. W. R. R." and "alizarine blue C. W. R. B." were discovered, and were introduced into this country in or about the year 1891. They are manufactured in Germany by the same corporation which made the older alizarine blue. They slightly varied from it in shade, were intended to take its place, and have partially done so. Ever since their introduction into this country they have been commercially known as "alizarine blues." In 1889 the remaining dye which is included in this appeal, called "alizarine blue 5 R.," was first imported into this country. It was discovered in 1873, is a very violet blue, and is not scientifically an alizarine color; for it is not apparently derived from anthracene, from which all the artificial alizarine colors originate. The protest was upon the ground of its commercial designation as an "alizarine blue." When introduced into this country it was called "alizarine blue," "alizarine violet," and "gallien," and the only testimony in regard to its present designation is from one of the appellees. In answer to the question, "How is that known in trade?" he said, "'Alizarine violet,' or 'alizarine blue,'—'gallien.'" The name "gallien" undoubtedly has reference to the galls used in its manufacture. No definite uniform or general commercial designation in this country was

shown, either before or after the date of the act of 1890, and the protest was not sustained by the evidence.

The remaining question relates to the proper classification of the two alizarine blues, which, not having been imported until after October, 1890, had no commercial designation in this country at the time of the passage of the tariff act of that year. It is plain that neither the importer nor the collector can sweep into a paragraph of a tariff act a novel article of merchandise, which was not the article therein described, because a particular trade-name which corresponded with the name of the old article was attached to the new article after the passage of the act. *Dennison Mfg. Co. v. U. S.*, 18 C. C. A. 543, 72 Fed. 258. The government, in order to take advantage of this principle, says that the paragraph in question enumerated six dyes, or six articles, by their commercial names, and that a commercial alizarine blue had been theretofore known and imported into this country, and was the article described, so that no previously unknown alizarine blue has a place in the paragraph. The mistake in the argument is in the premise. The fact is clearly disclosed in the record that the term "alizarine blue" covered a class which comprised different shades of the same color, or different blue alizarines, and litigation upon the subject of various alizarine dyes has been such that a court might almost take judicial knowledge of the fact. The question, properly stated, is this: Inasmuch as the commercial name relates to and includes a class of colors, are separate shades of color, which are members of the class, covered by the paragraph, although unknown to the commerce of this country, and without commercial designation therein, until after the passage of the act? The decisions of the supreme court have apparently settled this question. In *Smith v. Field*, 105 U. S. 52, the question before the circuit court was whether "torchon laces" were the commercial "thread laces" of a tariff act. The circuit court instructed the jury that the question for their determination was whether torchon lace was thread lace, and that it was immaterial whether torchon lace was known to commerce at the time the law was enacted, and that if brought in afterwards, and it came under the general designation of "thread lace," it was dutiable as such. The supreme court sustained this instruction. The question in *Pickhardt v. Merritt*, 132 U. S. 252, 10 Sup. Ct. 80, was whether "aniline dyes and colors, by whatever name known," included dyes, if commercially known to be aniline, though not known in commerce until after the passage of the act in controversy. The supreme court said that the rule in regard to commercial designation "was not inapplicable to the case because the articles in question were unknown in 1874, when the statute was enacted." As the court said to the jury, the law was made for the future, and the term "aniline dyes and colors, by whatever name known," included articles which should be commercially known whenever afterwards imported as "aniline dyes and colors." The case of *Newman v. Arthur*, 109 U. S. 132, 3 Sup. Ct. 88, bears also upon the subject of the applicability of general terms of classification to goods which are within the general terms, but which were introduced into the commerce of this country for the first time after the passage of the act. We are of opinion that alizarine blues, commer-

cially known to be such when introduced into this country, though not known in the commerce of this country until after the passage of the act of 1890, are free of duty, as members of the class of dyes called "alizarine blue," and made duty free. The decision of the circuit court is directed to be modified, and the case is remanded to that court, with directions to enter a modified decree in accordance with the foregoing opinion, so as to affirm the decision of the board of general appraisers as to alizarine blue 5 R., and to reverse it as to the other blues in the protest.

UNITED STATES v. ROSENSTEIN et al.

(Circuit Court, S. D. New York. December 16, 1898.)

No. 2,538.

CUSTOMS DUTIES—CLASSIFICATION—FRUIT PRESERVED IN ITS OWN JUICES.

Prunes boiled in water, and pressed through a colander, without the addition of sugar or any other material, which article is not a "jelly," in the common meaning of that term, nor commercially known as jelly, are dutiable under paragraph 219 of the tariff law of 1894, as fruits preserved in their own juices, and not under paragraph 218, as jelly.

This is an appeal by the United States from a decision of the board of general appraisers sustaining the protest of the importers as to the classification for duty of certain imported merchandise.

H. P. Disbecker, Asst. U. S. Atty.

Albert Comstock, for importer.

TOWNSEND, District Judge (orally). The articles in question are prunes boiled in water, and passed through a colander, and without the addition of sugar, gelatine, or any other material. The collector classified them as jelly, under paragraph 218 of the act of 1894, at 30 per cent. The importers protested, claiming that they were fruits preserved in their own juices, and dutiable, as such, at 20 per cent., under paragraph 219 of said act. The board of general appraisers sustained the protest of the importers, and the government appeals.

The evidence introduced before the board of general appraisers shows that the article in question is not a "jelly," in the common meaning of that term. While it is sometimes called a jelly in trade, the evidence before the board is insufficient to support the claim of the government that the article is commercially known as jelly. The evidence shows that it is in fact a fruit preserved in its own juices. The decision of the board of general appraisers is therefore affirmed.

UNITED STATES v. E. FOUGERA & CO.

(Circuit Court, S. D. New York. December 9, 1898.)

No. 1,844.

CUSTOMS DUTIES—CLASSIFICATION—MEDICINAL PREPARATIONS.

The medicinal use for which a proprietary preparation is designed dominates its chemical composition for the purpose of classification.

This is an appeal by the United States from the decision of the board of general appraisers as to the classification for duty of certain imported merchandise.

James T. Van Rensselaer, Asst. U. S. Atty.
W. Wickham Smith, for importers.

TOWNSEND, District Judge (orally). The merchandise in question consists of certain proprietary medicines known as "Brown's Chlorodyne" and "Liqueur de Dr. Laville." It is conceded that these articles are medicinal preparations. It also appears that they contain alcohol, and it is true that they are also combinations of products known as alkaloids and essential oils. But, while either designation is appropriate, I think the court is bound by the decision of the supreme court of the United States in *Fink v. U. S.*, 170 U. S. 584, 18 Sup. Ct. 770, in which the court holds, in effect, that the medicinal use for which the preparation is designed dominates its chemical composition, and is more specific. For this reason the decision of the board of general appraisers is affirmed.

E. & H. T. ANTHONY & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. December 17, 1898.)

No. 2,596.

CUSTOMS DUTIES—CLASSIFICATION—PORTRAIT LENSES.

A patent portrait lens, used as a part of a photographic camera, consisting of eight single lenses arranged in pairs and mounted in metal, which constitutes but a small part of the value of the whole, the complete articles being commercially known as lenses, is dutiable, under paragraph 100 of the tariff law of 1894, as "lenses of glass," and not under paragraph 98, as "optical instruments."

This is an appeal by E. & H. T. Anthony & Co. from the decision of the board of general appraisers affirming the classification for duty of certain imported articles of merchandise.

Albert Comstock, for importers.
J. T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question comprises an article known as "Dallmeyer's patent portrait lens." Each portrait lens contains eight lenses, consisting of four pairs of crown and flint glasses fastened together, and the article as a whole is used as part of a photographic camera, and is mounted in metal, and the different lenses are generally adjusted by means of a rack and pinion. The value of the whole lens is \$200. The value of the metal does not exceed \$10. The article was classified for duty, under the provisions of paragraph 98 of the act of 1894, at 40 per centum ad valorem, as "optical instruments." The importers protested, claiming that it was dutiable under the provisions of paragraph 100, as "lenses of glass, wholly or partly manufactured." It cannot be disputed, in view of the evidence, that these articles are commercially known as "lenses," and that they are not commercially known as

"optical instruments." Counsel for the United States contends, however, that under paragraph 100 of said act are only included lenses composed entirely of glass or pebble, and not mounted; and, furthermore, that these articles, in common speech, are optical instruments. These articles are not optical instruments, in ordinary parlance. They are not something designed to aid the sight; nor are they optical instruments *ejusdem generis*, as "spectacles, eye glasses, goggles, or opera glasses." Inasmuch as the complete lenses contain and are chiefly composed of what are commonly known as "lenses," and said complete lenses are universally commercially known as "lenses," and are not commercially or in ordinary parlance "optical instruments," and in the absence of any satisfactory evidence that congress did not intend to include these articles under the provision for "lenses," it must be held that they should have been assessed, under the provisions of paragraph 100 of said act, as "lenses of glass." The decision of the board of general appraisers is therefore reversed.

MEYER v. UNITED STATES.

(Circuit Court, S. D. New York. December 16, 1898.)

No. 1,516.

CUSTOMS DUTIES—CLASSIFICATION—COTTON ARTICLES ORNAMENTED BY "DRAWN WORK."

Cotton bureau covers, and other like articles, ornamented by fancy work, or effects produced in part by drawing out threads of the fabric, and in part by binding the remaining threads into groups, so as to form open spaces,—such work being known as "drawn work,"—are not embroidered, and are dutiable under paragraph 355 of the tariff law of 1890, as manufactures of cotton not enumerated, and not under paragraph 373, as manufactures of cotton embroidered.

This is an appeal by F. Meyer from the decision of the board of general appraisers affirming the classification for duty of certain imported articles of merchandise.

Albert Comstock, for importer.

J. T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The evidence and sample in this case show that the cotton bureau covers, and like articles, which are its subject, were ornamented with fancy work or effects produced in part by drawing out threads of the fabric, and in part by binding the remaining ones into groups by the use of needle and thread, so as to form open spaces between them. Fancy work of this character is known as "drawn work." The articles were classified for duty as "manufactures of cotton, embroidered," under paragraph 373 of the act of 1890,—apparently on the theory that the use of the needle and thread in producing this open work was embroidery. But not all sewing or stitching with needle and thread is embroidery, nor tambouring (which would equally render them dutiable as assessed), the proof in the case showing that drawn work is different

from either. The contention of the importer that this importation was a manufacture of cotton not enumerated is therefore sustained by the evidence. Decision of the board of appraisers reversed.

UNITED STATES v. H. BOKER & CO.

(Circuit Court, S. D. New York. December 17, 1898.)

No. 2,459.

CUSTOMS DUTIES—CLASSIFICATION—STEEL STRIPS.

Steel strips flattened from round steel wire, not smaller than 13 wire gauge, and cut into lengths, not valued at above three cents per pound, are dutiable under paragraph 122 of the tariff act of 1894, covering "steel in all forms and shapes not specially provided for, * * * valued above two and two-tenths cents and not above three cents per pound," and not under paragraph 124, as articles manufactured from round steel wire

This was an appeal by the United States from a decision of the board of general appraisers sustaining the protest of the importers as to the classification of certain imported articles of merchandise.

James T. Van Rensselaer, Asst. U. S. Atty.

Albert Comstock, for importers.

TOWNSEND, District Judge (orally). The merchandise in question comprises steel strips flattened from round steel wire, not smaller than 13 wire gauge, and cut into lengths. The board of general appraisers, sustaining the claim of the importers, classified the articles for duty, under the provisions of paragraph 122 of the act of 1894, at nine-tenths of one cent per pound for "steel in all forms and shapes not specially provided for in this act, * * * valued above two and two-tenths cents and not above three cents per pound." The United States appeals from said decision, claiming that these strips are articles manufactured from round steel wire, and therefore dutiable at one and one-quarter cents per pound, and with an additional duty of one cent per pound, under the provisions of paragraph 124 of said act.

The government relies upon the case of *Junge v. Hedden*, 146 U. S. 233, 13 Sup. Ct. 88, where dental rubber was held to be an article of rubber. It does not appear, however, that these wire strips come within the reasoning of that decision. The mere flattening of the round wire does not constitute it an article manufactured from wire.

There is considerable force in the further contention of counsel for the importers that congress would not have thus provided that while such steel strips, when valued at over four cents a pound, should pay only a duty of 40 per cent., these strips, concededly not worth more than three cents per pound, should thus pay from 75 to 100 per cent. of duty. The decision of the board of general appraisers is affirmed.

UNITED STATES v. J. S. JOHNSON & CO.

(Circuit Court, S. D. New York. December 15, 1898.)

No. 2,227.

CUSTOMS DUTIES—CLASSIFICATION—PINEAPPLE JUICE.

Pineapple juice, containing no alcohol whatever, is dutiable, under paragraph 247 of the tariff law of 1894, as "fruit juice * * * containing eighteen per centum or less of alcohol," and not under section 3, as a nonenumerated manufactured article.

This is an appeal by the United States from a decision of the board of general appraisers sustaining the protest of J. S. Johnson & Co. against the classification for duty of certain imported merchandise.

James T. Van Rensselaer, Asst. U. S. Atty.

Stephen G. Clarke, for importers.

TOWNSEND, District Judge (orally). The article in question is pineapple juice, containing no alcohol whatever, assessed for duty, under paragraph 247 of the act of 1894, as "fruit juice * * * containing eighteen per centum or less of alcohol." The importers protested, claiming the same to be dutiable, under section 3 of said act, at 20 per centum ad valorem as a nonenumerated manufactured article. In view of the decision of Judge Wheeler in this circuit in *Park v. U. S.*, 84 Fed. 159, I feel obliged to reverse the decision of the board of general appraisers. The decision is therefore reversed.

ROBBINS v. UNITED STATES.

(Circuit Court, S. D. New York. December 16, 1898.)

No. 2,365

CUSTOMS DUTIES—CLASSIFICATION—INITIALED HANDKERCHIEFS.

Handkerchiefs on which an initial is embroidered are dutiable, under paragraph 258 of the tariff law of 1894, as "handkerchiefs," and not under paragraph 276, as "embroidered handkerchiefs."

This is an appeal by B. C. Robbins from a decision of the board of general appraisers affirming the classification for duty of certain imported merchandise.

W. Wickham Smith, for importer.

J. T. Van Rensselaer, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise herein comprises handkerchiefs on which were embroidered an initial. They were assessed at 50 per cent. ad valorem, under the provisions of paragraph 276 of the act of 1894, as "embroidered handkerchiefs." The importers protested, claiming that they were dutiable at 40 per cent. ad valorem, under the provisions of paragraph 258 of said act, as "handkerchiefs." This question has already been before the courts under the provisions of the tariff act of 1890 (paragraph 373), which

provided for a duty on embroidered and hemstitched handkerchiefs. In view of the decisions in *U. S. v. Harden*, 35 U. S. App. 340, 15 C. C. A. 358, and 68 Fed. 182, and *U. S. v. Jonas*, 55 U. S. App. 64, 27 C. C. A. 500, and 83 Fed. 167, I find that the articles in question are not embroidered, and the decision of the board of appraisers is therefore reversed.

FARMERS' LOAN & TRUST CO. v. COUNCIL BLUFFS GAS & ELECTRIC LIGHT CO.

(Circuit Court, S. D. Iowa, W. D. December 22, 1898.)

No. 337.

1. INTERNAL REVENUE STAMPS—DEED BY MASTER.

The fact that a conveyance is made by a master commissioner under a decree of foreclosure in which the priority of liens is considered and settled, and after competitive sale, does not affect the requirement that the instrument, being a "conveyance of realty," under Schedule A of the revenue law (Laws 55th Cong. 2d Sess. c. 448), shall have the required revenue stamps affixed, to be receivable for record.

2. SAME—EXEMPTIONS.

The exemption of checks, drawn by the clerk of the district court on funds held by the court, from the requirement as to revenue stamps, cannot be extended to a deed executed by the master commissioner, although the property conveyed in the deed has been in the hands of a receiver under the order and direction of the court.

3. SAME—EXPENSES.

The revenue stamps required to be affixed to a conveyance of realty may be paid for, as expenses, out of the funds in the hands of the receiver, when the conveyance is by a master under decree and sale.

Harl & McCabe, for rule.

W. M. Shepard, pro se.

WOOLSON, District Judge. The facts leading up to the rule herein issued are as follows: Upon application, duly presented, this court appointed a receiver in foreclosure proceedings herein pending at the instance of the trustee in the matter of a trust deed given by the Council Bluffs Gas & Electric Light Company upon the property and plant of said company, situated in said city of Council Bluffs. Decree was entered ordering sale of said plant and property, and the matter proceeded to sale, the report of sale of the master commissioner was confirmed, and deed ordered thereon. The bid was about \$288,000. Upon presentation to him, to be recorded, of the master's said deed, the county recorder of Pottawattamie county, Iowa, refused to accept same, or to file same for record, for the reason, as assigned by him, that such deed did not have affixed thereto the revenue stamps required by the internal revenue statute relating thereto. On application of said master and the grantee in said master's deed, a rule pro forma was issued on said county recorder to show cause why he should not file and record said master's deed without the same having affixed thereto such revenue stamps. The recorder has made his return, stating that, under the provisions of the statute relating to internal revenue, the master's deed, being an instrument whereby realty, etc., is granted and transferred, cannot by him be filed or recorded un-

til the same has affixed thereto revenue stamps to the amount as in said statute provided, and that he now is, and always has been, ready and willing to file and record said deed when thus duly stamped in accordance with said statute. The statute above referred to is chapter 448, Laws 55th Cong., 2d Sess., and is found on page 448 of the statutes of that session. Section 15 (page 455) is as follows:

Sec. 15. That it shall not be lawful to record or register any instrument, paper or document required by law to be stamped unless a stamp or stamps of the proper amount shall have been affixed and cancelled in the manner prescribed by law; and the record, registry or transfer of any such instruments upon which the proper stamp or stamps aforesaid shall not have been affixed or cancelled as aforesaid shall not be used in evidence.

Under Schedule A is given (page 460) the following, as to the amount of stamps required on conveyances:

Conveyance: Deed, instrument or writing, whereby any lands, tenements or other realty sold shall be granted, assigned, transferred or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents; and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents.

There appears in the statute no provision expressly exempting masters' deeds from the requirements as to stamping conveyances. That the master's deed above described is a "writing, whereby * * * realty sold" is granted and transferred to the purchaser, is conceded. But it is claimed that said deed is exempt from the provisions of this statute, because the same conveys property which was at the date of such conveyance in the possession and control of this court (that is, the receiver of this court), and said deed is, by order of this court, made by one of its officers, viz. the standing master in chancery, and that, therefore, this statute, in so far as it requires that revenue stamps shall be affixed to said deed, is obstructing the administration of justice, and cannot be upheld. If taken in its full meaning, the position here assumed, against the application to the present case of the statute just quoted, would make wholly unnecessary the stamping of sheriffs' and marshals' deeds, as well as those of masters and commissioners appointed by the court. I can scarcely believe that congress intended such deeds should be thus exempt, and I strongly hesitate to adopt a construction which must effect such a result, and such a loss of revenue. The contention extends further, and to the effect that since this statute has been held not to apply, as to its requirements as to stamping checks, to checks drawn by the clerk of this court upon money in the registry of the court, the same construction must apply to deeds made, under the order of the court, by one of its officers. In my judgment, this latter contention is not well founded. When money is paid into the registry of the court, the person so paying the same has thereafter no title or claim to such money, save as the order of court may subsequently otherwise determine. The possession and right of possession is in the court, or its officer, receiving such money. It is held for the benefit of such persons as may be found entitled thereto. And the practice and rules of the court require that it shall be paid out only on the order of the

court, which is in part, at least, evidenced by the countersigning of the check by the judge. This order is, in effect, the paying out by the court of money or funds held by the court. Not so, however, as to lands upon which the decree of the court operates. The title to the land remains in the grantor in the trust deed until such title passes by means of the master's deed. Neither the court, nor its master in chancery, in any true sense, has such title. The deed of the master, under the decree, is merely the instrument which the law uses to pass the title from the grantor in the trust deed to the purchaser at the sale. Save as the decree may operate to divest liens and the like, the master's deed passes no greater title than would have passed had such grantor himself made such conveyance directly to such purchaser. And if, in the latter case, the statute validly requires that the conveyance be properly stamped, it would seem that the master's deed, accomplishing the same purpose, must be stamped, unless very strong grounds are shown to the contrary. That congress had the constitutional right to enact the statute in its general provisions was conceded on the argument. The cases cited by counsel, under former statutes, relating to the affixing of revenue stamps, are not found to be applicable here. The cases so cited relate to processes of court, and like proceedings. In this respect a manifest difference exists between the facts involved in the former and those in the present statute. In the present case the instrument is a writing conveying realty,—transferring title. The Iowa case cited (*City of Muscatine v. Sterneman*, 30 Iowa, 526) related to the stamping of a bond. And the statute was there upheld. Under the present statute the duty of placing stamps on a conveyance appears to be upon the grantor. See section 9. If the United States were grantor, there would be strong reason for holding that the act did not contemplate that the government should be required to thus stamp its own conveyance. But, as we have seen, the deed in question is not a conveyance by the government. It does not purport to, nor does it, convey any title, interest, or right held by the government. It only conveys the title and interest of the grantor in the trust deed. The sale and conveyance are not for the benefit of the government, but for the benefit of the grantees in the trust deed, and, if not of them, then surely of the purchaser at the master's sale. If A. files in this court his bill to compel B. to perform his contract to convey certain realty, and the suit progresses to decree sustaining the bill, and in accordance therewith B. executes his conveyance of the realty, I understand counsel to concede that B.'s deed, under the statute in question, must be properly stamped. But if B. does not himself execute the conveyance, as required by the decree, and the master named in the decree executes the conveyance, it does not appear why this deed from the master should not be stamped. The master's deed simply conveys the same right and interest which would have passed by the deed of B. Wherein does the application of this statute materially differ in the case just considered from its application to the case at bar? Here, also, the right and interest passed by the master's deed would have passed by a deed directly from the grantor in the trust deed. That the sale was made through a public sale, with competi-

tive bidding, does not affect the matter under consideration; nor that in the progress of the foreclosure proceeding the priority of liens against the realty was considered and settled. Nor is the application of the statute affected by the fact that a receiver, under order of the court, had been operating and conserving the property. While thus being operated by the receiver the title to the property remained in the grantor in the trust deed, until divested by the deed of the master. That a large amount of stamps is required under the statute does not change the rule to be applied. The underlying principle is the same, whether the revenue stamps are of large or small amount. If such stamps are required to be affixed to the deed, why may not their amounts be properly treated as part of the costs or expenses of the proceeding? What substantial difference, as to being properly costs or expenses, exists between such stamps and the expense of publishing notice of sale, or the like? The law requires publication of such notice. The expense is taxed as costs or expense of sale. And if the evidence of the sale,—the deed,—either in its drafting, execution, or stamping, is attended with expense reasonable in amount, why may not this be properly treated as a like expense? That the amount of stamps is reasonable, we may not question, because the statute fixes such amount. Why may it not be thus treated, and paid as expenses?

Since the submission of the question involved herein, my attention has been called to a decision made by the commissioner of internal revenue (2 Treasury Dec. p. 864), of date November 17, 1898, wherein it is announced that "deeds of masters in chancery are required to be stamped." It thus appears that the conclusion hereinbefore reached is in accord with the construction and practice adopted by the treasury department.

In the present case the payment for the stamps required for the master's deed can be, if necessary, taken from the funds now in the receiver's hands, which have been earned by the property pending foreclosure and sale herein. The rule upon the county recorder of Pottawattamie county, Iowa, must be discharged, and it is so ordered.

KIRK v. WESTERN UNION TEL. CO.

(Circuit Court, N. D. California. January 3, 1899.)

No. 12,689.

REVENUE ACT—TELEGRAMS—DUTY TO STAMP.

Under the act of congress of June 13, 1898, § 18 (30 Stat. 456), providing that a telegraph company shall incur a certain penalty for transmitting a message not stamped as therein required; and section 7 (30 Stat. 452), providing that any person who shall "make, sign, or issue" an instrument not properly stamped shall be subject to a fine,—it is the duty of the maker or signer of the message offered for transmission to affix the stamp.

Action at law to recover damages in the sum of \$5,000, for the alleged neglect of the defendant to transmit a certain telegraphic message presented to the defendant by the plaintiff on the 11th day of August, 1898.

E. Myron Wolf, for plaintiff.

R. B. Carpenter, for defendant.

MORROW, Circuit Judge. This is an action to recover damages for the alleged neglect of the defendant to transmit a certain telegraphic message presented to the defendant by the plaintiff on the 11th day of August, 1898. The defendant has interposed a demurrer to the complaint, on the ground that it does not appear from the complaint that the telegram alleged therein to have been offered to the defendant for transmission and delivery had upon its face or elsewhere the internal revenue stamp required by section 7 of the act of congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes."

Section 6 of the act referred to provides as follows:

"That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, and things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule." 30 Stat. 451.

Section 7 provides:

"That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court." 30 Stat. 452.

Section 9 provides:

"That in any and all cases where an adhesive stamp shall be used for denoting any tax imposed by this act, except as hereinafter provided, the person using or affixing the same shall write or stamp thereupon the initials of his name and the date upon which the same shall be attached or used, so that the same may not again be used." 30 Stat. 453.

Section 18 provides:

"That on and after the first day of July, eighteen hundred and ninety-eight, no telegraph company or its agent or employé shall transmit to any person any dispatch or message without an adhesive stamp, denoting the tax imposed by this act, being affixed to a copy thereof, or having the same stamped thereupon, and in default thereof shall incur a penalty of ten dollars: provided, that only one stamp shall be required on each dispatch or message, whether sent through one or more companies: provided, that the messages or dispatches of the officers and employés of any telegraph company or telephone company concerning the affairs and service of the company, and like messages or dispatches of the officials and employés of railroad companies sent over the wires on their respective railroads shall be exempt from this requirement: provided further, that messages of officers and employés of the government on official business shall be exempt from the taxes herein imposed upon telegraphic and telephonic messages." 30 Stat. 456.

In section 25 of this same act it is provided, under the head of "Schedule A, Stamp Duties": "Dispatch, telegraphic: Any dispatch or message, one cent."

It is contended in support of the demurrer that it was the duty of the plaintiff to affix and cancel the internal revenue stamp provided in the last section, before tendering the dispatch to the defendant for transmission, and that negligence cannot be charged against the defendant for its refusal to transmit a message which was not stamped by the plaintiff as required by law. The real question submitted to the court for decision is this: Upon whom does the law impose the burden of paying the stamp tax,—the sender of the message, or the telegraph company? The document being subject to tax under Schedule A, the fine or penalty imposed for the omission to affix and cancel the proper stamp is, under section 7, imposed upon the person who makes, signs, or issues the document. The statute is in the disjunctive, and reaches not only the omission of the person who issues a document subject to the tax, but the maker and signer of the instrument. The law for this purpose takes notice, therefore, of the person who writes out and signs a dispatch, and makes him liable for the omission to stamp the instrument he creates. By the terms of the stamp schedule, the tax of one cent is placed upon this instrument as prepared by the sender, without reference to any act of the telegraph company in transmitting the message to its destination. The instrument described is a "Dispatch, telegraphic: Any dispatch or message." Had it been intended to impose this tax upon the telegraph company, congress could certainly have identified the subject of taxation as the document transmitted by the telegraph company; and it may be said that the penalty of \$10, provided in section 18 for the default of the telegraph company in transmitting a dispatch or message without the stamp denoting the tax imposed by law, is such an identification of the subject intended to be taxed. But the difficulty with this interpretation of the statute is that it does not relieve the sender from the fine of not more than \$100 for his omission to affix the proper stamp to the dispatch or message as made and signed by him, and delivered to the telegraph company for transmission. Two penalties are clearly imposed upon parties engaged in making and transmitting an unstamped dispatch or message,—a fine of not more than \$100 upon the party who makes, signs, or issues the document; and a penalty of \$10 upon the telegraph company for transmitting it to its destination,—the first being intended to secure the payment of the tax, and the latter the attention and service of the telegraph company in the enforcement of the law.

It follows, therefore, that the instrument set forth in the complaint was subject to a stamp tax, and that it was the duty of the plaintiff, as the maker and signer of the instrument, to affix to it, and cancel, the stamp required by law, before he can charge the defendant with neglect in failing to transmit the message to its destination. The demurrer will be sustained.

DADIRRIAN v. YACUBIAN et al.

(Circuit Court, D. Massachusetts. December 1, 1898.)

No. 503.

TRADE-MARKS—FOREIGN NAME OF ARTICLE.

The word "Matzoon," which has been for centuries in Armenia the name of an article of food or diet prepared from sterilized and fermented milk, cannot be appropriated as a trade-name by the person who first introduced the article, as well as the name, into trade in this country.

This is a suit in equity by Markar G. Dadirrian against Gamaliel M. Yacubian and another to restrain the infringement of a trade mark or name.

Betts, Betts, Sheffield & Betts, for complainant.

Alex. P. Browne, for defendants.

COLT, Circuit Judge. In a suit by this complainant against these defendants in the United States circuit court for the Northern district of Illinois, Judge Showalter, on motion for a preliminary injunction, in a well-considered and able opinion (72 Fed. 1010), held that the word "Matzoon" (or "Madzoon"), having been used in Armenia for centuries to designate an article of food or diet made from sterilized and fermented milk, cannot be appropriated as a trade-mark by the complainant, who first introduced both the name and the article into trade in this country; nor can the defendants be enjoined on the theory that the word has become, in a special and secondary sense, a mark of the origin of complainant's goods, because the defendants' label plainly distinguishes their own product from that of the complainant. The present bill was filed July 7, 1894. On November 14, 1894, Judge Carpenter denied a motion for a preliminary injunction. The present hearing was had upon full pleadings and proofs. We have carefully examined the evidence and briefs of counsel, and agree with the conclusions reached by Judge Showalter in the Illinois case. We find nothing in the present record that would, in our opinion, warrant the court in reaching any different conclusion; and we do not see how we can add anything of importance to the reasoning of the court in its opinion in the Illinois case. We cannot resist the conviction that Dr. Dadirrian did not originally adopt the word "Matzoon" as a fanciful or arbitrary name, and that it was not his intention to make a new preparation or product, but that he started with the intention of introducing for the first time into this country a preparation of fermented milk well known for centuries in Armenia, Turkey, and other Eastern countries, and that he intended to call it by its common and well-known Armenian name. Dr. Dadirrian, after graduation at the New York University Medical College in 1871, returned to his old home in Armenia, Asia Minor. He came back to New York in 1884, and began the practice of his profession. In July, 1885, he first put his preparation of "Matzoon" on the market. On June 18, 1885, he read a paper before the New York Academy of Medicine on "Matzoon, or Fermented Cow's Milk," and exhibited samples. That paper declares that:

"Since the earlier periods in history fermented cow's milk has been abundantly used in Armenia, Persia, Turkey, Arabia, and other Eastern countries, by all classes, and in all seasons of the year. It is made in every house, and ordinary milk is not at all used as an article of diet. * * * There are two kinds. One is thick, sometimes like jelly or condensed milk; the other is liquid, like butter milk or koumiss. These two kinds, the one or the other, according to preference, are used for the following purposes: As an article of diet. * * * In Asia Minor, and even in Constantinople, Matzoon is put upon the table in a large dish, and is eaten with bread as a kind of dessert. * * * The farmers use Matzoon when in the field, and by workingmen generally it is used to quench thirst. * * * It is used as an antidote for all kinds of poisoning. * * * It is used as a prophylactic during every epidemic. * * * It is used as a panacea in all acute febrile diseases. * * * Matzoon is more savory than koumiss, although the two do not differ entirely from each other."

In Dr. Dadirrian's earliest circular he said, with respect to his preparation:

"This preparation of milk originated in Armenia, around Mount Ararat, and extended thence to distant countries in Asia Minor, etc. It is used in these countries largely as food and as medicine in every form of febrile diseases; also as an antidote to poisons. * * * It is prepared from pure milk alone. * * * I present this preparation to the medical profession and public in America as differing essentially from other preparations of the kind in present use, without seeking to disparage their acknowledged value, but as something new and altogether unused here, and having many different properties from the others, and ask for it a trial at their hands, with great confidence in its value, based upon a personal experience in its use during three years in Asia Minor, ten years in Constantinople, and considerable time in New York, and from observing its usefulness in the hands of eminent American, German, and French physicians in Constantinople."

On September 2, 1884, Dr. Hamlin, an American missionary, who had witnessed the beneficial effects of Matzoon in the East for 40 years, wrote to Dr. Dadirrian as follows:

"I am glad of your effort to introduce Matzoon. I used it constantly in its solid form for thirty years in Turkey."

Dr. Van Lennep, late missionary of the American board in Turkey, writes to Dr. Dadirrian, under date of September 12, 1885:

"I am glad to learn that you are introducing into this country the celebrated Oriental fermented milk food, called 'Matzoon.' The Arabs set so high a value upon it that they hold a tradition that an angel was sent from Heaven to reveal the secret to their father, Abraham; and they drink no water, but their favorite Matzoon instead, which stands night and day in a large dish near the entrance of the tent."

Upon Dr. Dadirrian's own admissions, we fail to see how he can claim "Matzoon" as, in any proper sense, an arbitrary or fanciful word, and therefore the proper subject of a trade-mark. We think this case is clearly governed by the opinion of the supreme court in the leading case of *Canal Co. v. Clark*, 13 Wall. 311.

The defendants' label is so different in appearance from complainant's that no relief can be granted on the ground that the ordinary purchaser is likely to be deceived or of unfair trading. Bill dismissed.

VAN CAMP PACKING CO. v. CRUIKSHANKS BROS. CO.

(Circuit Court of Appeals, Third Circuit. November 28, 1898.)

No. 11.

UNFAIR COMPETITION IN TRADE—IMITATION OF PACKAGES AND LABELS—PRELIMINARY INJUNCTION.

Where imitation of packages, stamps, and letters is complained of, the question is whether there is such similarity as is likely to impose on ordinary purchasers, exercising such care only as is commonly used in purchasing the article in question. When this question cannot be answered with certainty or safety, and there is no proof that any one has actually been misled, a preliminary injunction is properly denied.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

This was a suit in equity by the Van Camp Packing Company against Cruikshanks Bros. Company to restrain alleged unfair competition in business. The complainant has appealed from an order of the circuit court refusing to grant a preliminary injunction.

V. H. Lockwood, for appellant.

George H. Quail, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BUTLER, District Judge.

BUTLER, District Judge. The case is here on appeal from an order dismissing a motion for preliminary injunction. The facts are correctly stated by the circuit court, as follows:

"The complainant, a corporation of the state of Indiana, filed this bill to restrain the respondents from infringement of their alleged trade-mark and from continuing unfair business competition. The bill alleges that complainant has been engaged in making catsup since 1888, and had prior to August, 1896, built up a large trade in, and a valuable reputation for, catsup of its manufacture. That about the latter date complainants began packing and selling single bottles of their catsup in paper boxes or cartons and placed thereon such devices and lettering as identified the Van Camp goods. The bill states 'that the essential feature of said box or carton is the said representation of a bottle thereon'; that it was customary for grocers to place said boxes on their shelves with the picture of the bottle showing; that they also built up large pyramids of boxes on their counters and in their windows; that by means thereof, also of displays made by complainants at food exhibits through the country and extensive advertising of said style of packages, the public had become familiar with complainant's goods. The bill alleges complainants were the first to put up catsup in boxes or cartons of the form and appearance described. It alleges the respondents have since begun to pack and sell their catsup in cartons or boxes identically like those of complainant and with such illustrations, representations, words and other features as were calculated to deceive and mislead the public into the belief they were complainant's goods. The respondent by answer and affidavits allege amongst other things, they have been manufacturing catsup for some eighteen years, that in January, 1897, they ordered paper boxes and thereafter began selling their catsup in such boxes; that they used the common ordinary style of 'knock down' box of a size suitable for a catsup bottle and placed thereon a picture of their own well-known bottle; that in color, style, lettering and design their package is radically different from complainant's; that it was not made to simulate or copy complainant's package. They deny that any one has been deceived by their design and mistaken it for complainant's, and allege that no one using the most ordinary care, could mistake their package or goods for complainant's."

The defendant's use of boxes or cartons similar to the plaintiff's, without more, could not be complained of. It is a common method of packing various articles of merchandise; and even if the plaintiff was the first to apply it to packing catsup he has not thereby obtained a monopoly of its use for that purpose. *Harrington v. Libby, Cox, Man. Trade-Mark Cas. No. 538, 12 O. G. 188 [Fed. Cas. No. 6,107]*. The plaintiff admits this, but asserts that the defendant has so imitated his boxes and the stamps and letters upon them, as to mislead the public, and induce purchasers of his catsup under the belief that it is the plaintiff's. The boxes and their markings are readily distinguishable from the plaintiff's by intelligent persons; and with care ordinary purchasers would probably distinguish them. The question, however, is, do they bear such similarity as is likely to impose on ordinary purchasers, exercising such care only as is commonly used in purchasing such articles? This question cannot be answered with certainty, or safety, from the evidence before us. There is no proof that any one has been so misled. In this state of uncertainty the court was not wrong in denying the motion. As has frequently been said, to justify a preliminary injunction the plaintiff's case must be clear in all respects. Upon the record as at present made up, the plaintiff's is not. The appeal must therefore be dismissed and the order affirmed.

SOCIETE ANONYME DU FILTRE CHAMBERLAND SYSTEME PASTEUR
et al. v. ALLEN et al.

(Circuit Court of Appeals, Sixth Circuit. November 9, 1898.)

No. 556.

1. PATENTS—PRELIMINARY INJUNCTION—REVIEW OF ORDER.

The functions of the circuit court of appeals, in reviewing orders granting or refusing preliminary injunctions, are such that it may properly affirm an order granting an injunction in one case, and an order refusing one in another, on substantially the same evidence; the matter being one not involving the exercise of exact legal judgment on the part of the trial court, but merely judicial discretion.¹

2. SAME—FAILURE OF DEFENDANT TO MAKE FULL DISCLOSURE.

The refusal of a preliminary injunction in a suit for infringement, although the defendant's affidavits did not disclose the materials or mode of manufacture of the alleged infringing product, will not be reversed on appeal, the weight to be given to such fact being a matter within the sound discretion of the trial court.

Appeal from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

Paul A. Staley, for appellants.

Almon Hall, for appellees.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge. This is an appeal from an order of the circuit court of the Northern district of Ohio refusing to grant a preliminary injunction on a bill filed by the Societe Anonyme Du Filtre

¹ As to decrees granting injunctions in patent cases generally, see notes to *Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co.*, 3 C. C. A. 572, and *Southern Pac. Co. v. Earl*, 27 C. C. A. 189.

Chamberland Systeme Pasteur and the Pasteur Chamberland Filter Company against Mortimer H. Allen and the Allen Manufacturing Company, to enjoin the infringement of letters patent No. 336,385, granted to Charles E. Chamberland for a filtering compound. 84 Fed. 812. The invention is described by the patentee in his specifications as follows:

"The means hitherto employed for filtering water ordinarily consist in the use of burned brick, powdered substances, and various other materials, but which, either from the character of the materials themselves, or from the manner in which they are used or compounded, are not fully satisfactory, where great thoroughness in filtering is requisite. However efficient the named substances may be for filtering purposes, yet they do not, however, retain all germs or microbes, or extremely fine organisms, which are in suspension in the water or other liquid. * * * My invention is designed more completely to hold back and retain such germs. The compound is formed substantially of pipe clay, or any other suitable clay, and porcelain earth, or its equivalents hereinafter named. The clay is diluted in water, and then mixed with porcelain earth or its equivalents. The porcelain earth is ground or reduced to fine powder in any suitable mill, after having been previously baked in any suitable kiln. The proportions are from twenty to forty per cent. of clay to sixty to eighty per cent. of porcelain earth or its equivalents. They may, however, vary more or less. I wish it, however, to be understood that I do not limit myself to the above-named substances; for the same, or very much the same, result may be attained by using, for instance, siliceous magnesia or its equivalent, instead of porcelain earth. * * * A filtering body produced from the above compound is homogeneous, and fulfills the required conditions for filtering. I do not wish to be understood as laying claim broadly to the materials hereinabove mentioned as a filtering compound, but only when they are treated as above specified." "I claim a filtering compound formed of porcelain earth baked and reduced to a powder and pipe clay, combined in the proportions set forth, the said compound being baked, substantially as set forth."

The defendant M. Allen, it appears from the evidence, had been sales agent of the complainant company. He had nothing to do, so far as the evidence shows, with the manufacture of the filtering compound, and was not possessed of any more of their trade secrets than was involved in the sale of the patented article. The complainant had great difficulty in finding out where the filtering material of the defendants was manufactured. Allen, the defendant, misled the complainant's agents on this point by false statements. They finally discovered, however, that the tubes or filtering vessels were made by the Brewer Pottery Company, at Tiffin, Ohio. Upon application to Brewer, the president of that company, for a sample of the material, he declined to give it, but said that he would testify in full when the suit was brought. The complainant obtained from Allen a piece of a broken tube, which was subjected to chemical and mechanical analysis. The results of these analyses are given in affidavits of chemists. They do not establish that the process of manufacture used was the same as that described in the patent, though they have some tendency to show that the materials were probably the same. Brewer, the president of the Brewer Pottery Company, makes an affidavit, introduced by the defendants, in which he swears that the process which he follows in making the filtering tubes for the defendants is a secret process, not known even to the defendants; that it is entirely different from that of the complainants; that he subjects the material to a heat of 3,000 degrees Fahrenheit,—a heat which would utterly destroy the tubes

of the complainants for filtering purposes; that the Allen tube is much less porous than the so-called Pasteur tube; that in the manufacture of the Allen tube there is no pipe clay or any ground, baked porcelain, or earthen ware used; that the clay compound used in the manufacture of the tubes for Allen is substantially the same compound which has been employed by potters and manufacturers of earthen and porcelain ware for more than 20 years; that the exact proportions of the compound, the degree of heat necessary, and the time of baking requisite for the best results have been arrived at only by careful experiment and extreme nicety of treatment; that, in arriving at the ingredients, proportions, and treatment of the material used in the manufacture, he has expended much time, trouble, and more money than he has received for the tubes, and for such expenditure of time, labor, and money he can receive adequate remuneration only by being permitted, for the present, to keep such formula and process secret; that he is willing, however, and will, if so directed, confidentially inform the court, or a proper commissioner to be appointed for that purpose, of the details of such formula and process. The court below found that there was not sufficient proof of infringement to justify his issuing the injunction. Referring to the refusal to disclose just what the defendants' filter was made of, the learned judge at the circuit said:

"It is quite true that this affidavit of Brewer's is somewhat disingenuous in its refusal to disclose the precise character of the compound he uses for the defendant, and the exact processes by which it is completed in the factory. He offers, in connection with his refusal, to disclose it confidentially to a commissioner of the court, but this scarcely will relieve the fact that he does refuse to disclose it, claiming it as a trade secret of his own. But I am not prepared to say that, if we give the most comprehensive effect to this refusal, the defendant is bound by it; nor am I quite prepared to say that on a defense like this of his manufacture he is bound to make such disclosure in an affidavit. If the plaintiffs need the proof in aid of their bill, they have the remedy of a bill of discovery, or of an examination of witnesses, and, in the absence of a resort to some such remedy for obtaining proof, it may be that the refusal to disclose is not reprehensible. The defendant is under no obligation to aid the plaintiffs in the procurement of their proof, and this is only another illustration of a necessity for waiting in a case like this until the final hearing before issuing any process of injunction."

The weight to be given to the circumstances of nondisclosure by the defendant or his witnesses upon a preliminary hearing with reference to the question of an infringement was one which addressed itself to the court below in the exercise of a sound legal discretion as to whether the preliminary injunction should issue or not. Unless we reach the conclusion that this discretion has been abused, we should not reverse the action of the court below. We are not prepared to say that, even in the absence of any direct evidence at all as to the infringement, a court might not, on a motion for a preliminary injunction, infer infringement from the disingenuousness of defendant's witnesses and their reluctance to disclose all the facts. The ordinary rule is that one who has knowledge peculiarly within his own control, and refuses to divulge it, cannot complain if the court puts the most unfavorable construction upon his silence, and infers that a disclosure would have shown the fact to be as claimed by the opposing party. But the court below has not deemed it proper, in view of the circum-

stances, to put this unfavorable construction on the conduct of the defendant and the person who makes his tubes. The complainant, even upon a preliminary hearing, had full opportunity to apply to the circuit court for leave to examine Brewer and compel a disclosure, but it did not see fit to take this course.

While, if this court were now called upon as an original question to announce a conclusion upon the weight of the evidence and the significance to be attached to the silence of the defendant and his witnesses in respect to the process by which his tubes are made, we might decide that there was sufficient evidence of infringement, we cannot say that the action of the court below in holding otherwise exceeded the limits of a sound judicial discretion. As we base our conclusion upon the issue of infringement, the prior decision of this court, and of other courts in other states, upon the same patent, upon applications for preliminary injunctions therein, are of no importance, because they did not present the same facts. The question for the court upon this hearing is whether the court below exceeded the limits of a sound judicial discretion in refusing an injunction to the complainant. We may answer this question in the affirmative, without deciding that, had the court entered an order for the injunction, that order should be reversed. The function of the court of appeals, in hearings like this, is such that it may properly affirm an order refusing a preliminary injunction in one case and an order granting it in another on substantially the same evidence, because it is easy to conceive a case presenting upon a preliminary hearing such an evenly balanced controversy that the court above would affirm the action of the court below, whether one way or the other, when that action involves the exercise, not of exact judicial judgment, but merely judicial discretion. The patent at bar has been before this court in the case of *Blount v. Societe*, 6 U. S. App. 335, 3 C. C. A. 455, and 53 Fed. 98. In that case the circuit court for the Southern district of Ohio had granted an injunction against the defendant, who had been the intimate and confidential agent and officer of the complainant company, and who, it was shown to the satisfaction of the circuit court, was making filters like those described in the patent. This court, after considering the record before the circuit court, held that, in the granting of the order of injunction, the sound legal discretion of the circuit court had not been improvidently exercised. In this case, upon the same patent, but upon different evidence as to the infringement, we hold that the action of the court below in refusing to grant an injunction was within the limits of its sound legal discretion. It is to be hoped that the patent and the evidence in this case will now come up for final hearing and the controversies arising on it be finally adjudicated. The order of the circuit court is affirmed.

SOLVAY PROCESS CO. v. MICHIGAN ALKALI CO. et al.
(Circuit Court of Appeals, Sixth Circuit. November 28, 1898.)

No. 588.

1. PATENTS—INVENTION—ADAPTING DEVICE TO USE IN NEW ART.

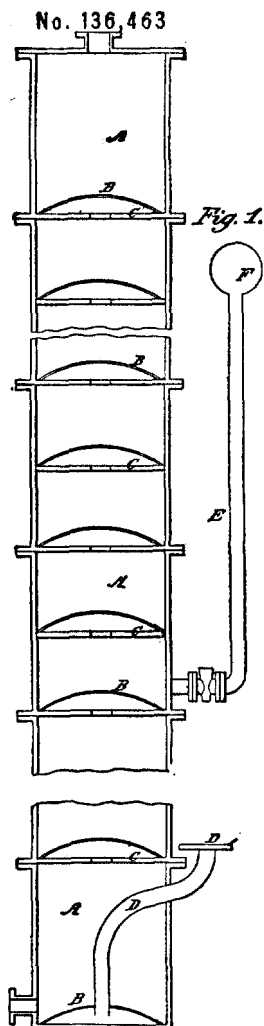
The adapting of a well-known device to the same use in a different art is not patentable.

2. SAME—APPARATUS FOR COOLING SALINE SOLUTIONS.

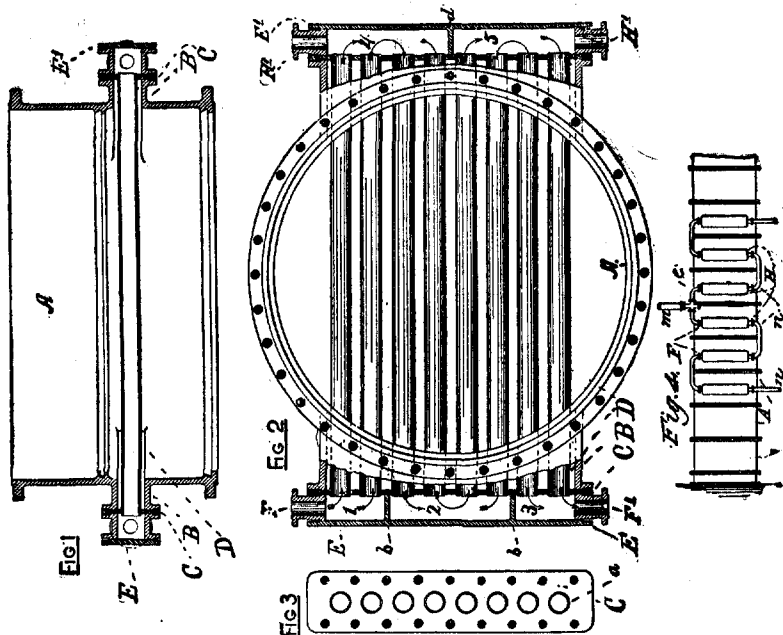
The Cogswell patent, No. 362,938, for an apparatus for cooling saline solutions, which consists of a series of connected transverse pipes passed through the Solvay column used in the manufacture of carbonate of soda, and through which cold water is circulated, is but the application to such column of a well-known method of cooling liquids, which does not involve patentable invention, and which was anticipated in the particular art for the same purpose in the Gerstenhofer apparatus for the manufacture of sodium carbonate, patented in 1881, and in Wigg's English patent, issued in 1882.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This was a bill in equity to restrain the infringement of a patent. Plaintiff, the Solvay Process Company, is the owner, by assignment, of a patent issued to William B. Cogswell, May 17, 1887 (No. 362,938), for the purpose of cooling saline solutions. The defendants attack the validity of the patent. The purpose described in the specifications of the patent is applicable to the absorber or bicarbonate column used by Ernest Solvay, and described in the specifications for a patent issued to him March 4, 1873, for an improvement in the process and apparatus for the manufacture of carbonate of soda. Fig. 1 of that patent, which is given on next page, sufficiently shows the structure of the column. Solvay said in the specifications: "Into this absorber I place a number of plates, perforated with small holes, so as to divide the gas as much and so often as practicable, and also a number of plates provided with one or a few large holes, which will just allow the liquor and gas to pass without permitting the fresh liquor entering the absorber to mix with the nearly-saturated liquor at the bottom of the absorber. The perforated plates I prefer to make of the shape of globular segments, and to provide them with projections or teeth round their circumference, the openings between the said teeth allowing the liquor and gas to pass, when the small holes may be partially stopped up. The above-mentioned plates may be cast as part of the apparatus, or be separate pieces, or be supported therein by any convenient means. This absorber is always kept nearly full of liquor, while the carbonic acid obtained from any convenient source, but by preference from a limekiln, is forced—say by means of an air pump—in at the bottom of the absorber through a pipe. The carbonic acid gas should enter under a pressure exceeding the pressure of the column of liquor which the gas has to pass through. By these means the gas is brought into very intimate contact with a high column of liquor moving in an opposite direction, and is at the same time made to expand, and to do a considerable amount of mechanical work, in consequence whereof it absorbs an amount of heat sufficient to prevent all heating of the liquor in the apparatus, otherwise produced by the absorption of the carbonic acid, and which I have found very difficult to prevent by any other means." The liquor referred to in the patent is a solution of salt and ammonia which, after uniting with carbonic acid gas, produces by two chemical reactions crystals of bicarbonate of soda.



The drawings, specifications, and claims of the patent in suit are as follows:



"Apparatus for Cooling Saline Solutions.

"Specification Forming Part of Letters Patent No. 362,938, Dated May 17, 1887.

"Application filed July 20, 1885. Serial No. 172,146.

"(No Model.)

"To All Whom It May Concern: Be it known that I, William B. Cogswell, of Syracuse, in the county of Onondaga, state of New York, a citizen of the United States, have invented certain new and useful improvements in bicarbonate columns, of which the following is a specification, reference being had to the accompanying drawings, in which Fig. 1 is a longitudinal vertical section of one of the horizontal segments of the column; Fig. 2, a top plan view of same, showing sections of construction at the ends of the piping system; Fig. 3, a plan view of the inner face of the pipe-heads; Fig. 4, an elevation of the column. My invention relates to the manufacture of bicarbonates, and it consists in the construction of the apparatus, and not in the chemical portion of the process. My object is to partially cool the liquid contents of the column, or reduce their temperature, so that they leave the column cooler than by the ordinary process, where tubular columns are used without any cooling attachments. It consists in the use of internal or partly internal and partly external cooling pipes, with the exterior internal surface of which the hot liquid comes into contact, and which pipes are kept as cool as possible by maintaining a flow of cold water through them, or by any other equivalent means. I construct my column as follows: A represents a section of the column, tubular in form, and provided with flanges, which are secured to the preceding and following sections in any ordinary manner, as the column is built up of successive superimposed sections until the desired height is reached. B, B, are rectangular nozzles, formed integral with the body of the column, opening outward and into the interior of the section, the openings being usually rectangular in form. These nozzles are located opposite to each other upon the periphery of the section, and usually in the same horizontal plane. C, C, are the flue sheets, perforated, as at a, to receive the flue pipes, D, D,

and also provided with holes to receive the bolts by which these sheets are secured to the outward flanges of the nozzles. The flues are set in these sheets in any ordinary manner. E, E', are the covers, provided with the partition walls b, b, upon E, and d upon E', which walls stand out at right angles to the inner faces of the covers, and when placed in position form the chambers 1, 2, 3, 4, and 5. F, F', are couplings for the inlet and exit pipes for the water or cooling mixture. H, H', are couplings, which can be used when it is desired to couple by connecting pipes the sections (two or more) of the column together, so that the water will flow from one section through another. In Fig. 4 several sections are shown coupled together, and all taking the water from a single stand-pipe, m; e, e, representing the connecting pipes and n, n, the exit pipes. My invention is operated as follows: The water enters the chamber 1 through the coupling, F, passes thence through the flues transversely into the chamber 4, thence through the flues into the chamber 2, thence across into the chamber 5, and thence across into the chamber 3, from which it passes out through the coupling, F'. The drawings show the pipes, D, arranged in pairs, but they may be arranged singly, or in any other manner desired. By the use of these pipes the contents of the column are much reduced in temperature when they leave it, and the quantity of bicarbonates produced is largely increased by the quickening of the process. What I claim as my invention, and desire to secure by letters patent, is: (1) A bicarbonate column consisting of a series of superimposed sections, provided with transverse flues continuously connected, and having inlet pipes opening into the flues and exit pipes coupling the sections together, substantially as described. (2) A section for a bicarbonate column, consisting of a body, A, nozzles, B, flue sheet, C, flues, D, cover, E, and inlet and exit couplings, F, F', constructed and operating together, substantially as described, for the purposes set forth. "In witness whereof I have hereunto set my hand this 5th day of January, 1885.

W. B. Cogswell.

"In presence of:

"C. W. Smith.

"S. D. Gilson."

It appears by the concession of counsel that the Solvay process patent was a very valuable one, and worked a revolution in the art of making bicarbonate of soda. No column was erected in this country until 1883. The plaintiff then built a column in accordance with the Solvay patent at Syracuse, N. Y. Considerable difficulty was found in preventing the heat caused by the reaction from arising to such a degree as to interfere with the proper chemical changes. At first a hose was used to throw the water upon the column which was 60 feet high and 6 feet in diameter. This proved not to be successful in properly reducing the heat. A water jacket was then put around the column, but that proved not to be what was desired. Finally, within three or four months after the column was built, Cogswell, the patentee, conceived the present apparatus. It was introduced into the column, and increased the production per day of a column from 12 tons of bicarbonate of soda to more than 30 tons. The court below held that there was no novelty in the device by reason of what was shown in the prior art.

Smith & Denison, for appellant.

Cyrus E. Lothrop, for appellees.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

TAFT, Circuit Judge (after stating the facts as above). We concur with the court below in the view that there is no patentable novelty in the device under consideration. The problem which Cogswell had to solve was how to prevent a column of liquid in which chemical reactions were producing heat from becoming so hot as to interfere with the reactions. In Gerstenhofer's patented apparatus for the manufacture of sodium carbonate was a tank in which the same chemical

reaction between carbonic acid and ammoniated brine, as in the Solvay process, was intended to take place. For the purpose of avoiding too great heat in the reactions, the patentee introduced a cylindrical coil of pipe winding about the inside surface of the tank, and coming in contact with the liquid to be cooled, and passed cold water through the coil. Gerstenhofer's patent was issued in 1881. In 1882 an English patent was issued to Charles Wigg for the making of carbonate of soda, in which soda was made by the same chemical reactions as those in the Solvay process. The ammoniated brine and carbonic acid gas were mixed in a tank. In order to facilitate the union, and to prevent too great heat, the inventor provided a reel with hollow arms or beaters rotating around a horizontal axis inside the tank, and passed cold water through the hollow arms. The arms extended transversely across the tank. In 1882, a patent was issued to F. O. Kunz for an apparatus for the cooling of mash in a distillery. It consisted of a series of transverse pipes so connected together as to permit a continuous flow of cold water from one end to the other of the vessel in which the mash was contained. In January, 1883, a patent was issued to F. Richter for a beer cooler. It was for a device having transverse pipes arranged in horizontal series in a vessel into which the beer was allowed to drip. Through the pipes there was a continuous flow of cold water. The inlet and outlet pipes were adjusted in relation to the various series so that water of different temperatures might be introduced into the different series as the operator should desire. It is common knowledge that one of the best modes of cooling liquids is by introducing pipes into the liquid to be cooled, and circulating through such pipes a cooler medium. So far as we can see, this is all that the patentee in the case before us did. The use of pipes for the very purpose which the patentee here had in mind is shown in the Gerstenhofer and the Wigg devices. The arrangement of such pipe in transverse horizontal series with provisions for varying the heat in the different series is shown in the Richter beer-cooler patent, already referred to. To apply the apparatus thus disclosed in the prior art to the Solvay column does not seem to us to have required any invention whatever. The cross-examination of the complainant's expert by Mr. George Lothrop demonstrates how small a step in the art the complainant's device was:

"X. Q. 17. If steam or hot water were passed through the column of the Cogswell patent, instead of ammoniated brine, would not water circulating through the transverse flues cool the steam or hot water in the same manner that it cools ammoniated brine in the operation of the Cogswell apparatus? A. If the water which circulates through the pipes called the transverse flues in the Cogswell patent is cooler than the water or the steam which is passed through the column as supposed in the question, the cooler water in the pipes will absorb and carry off heat from the surrounding hotter fluid, whatever that may be, whether steam, water, or ammoniated brine. X. Q. 18. Has it not been long known that if a heated fluid be passed through a vessel it can readily be cooled by a water circulating pipe placed transversely to the path of the moving fluid? A. Yes, sir. X. Q. 19. Was not this well known long prior to the date of Mr. Cogswell's alleged invention? A. I think it was. X. Q. 20. Referring to the patent to Kunz, does not that patent show and describe a cooling apparatus built of a series of superimposed sections so arranged as to form a continuous passage for fluid from the top of the top section to the bottom of the lower section? A. It does. X. Q. 21. Is not

each section of that apparatus provided with transverse cooling pipes through which water may be made to circulate? A. It is. X. Q. 22. Are not the transverse cooling pipes in one section shown and described as connected with the transverse cooling pipes in the adjacent section? A. They are. X. Q. 23. Assuming that water is circulated through the transverse cooling pipes of the Kunz patent, will not those pipes cool any fluid passed through the apparatus, provided such fluid be hotter than the water in the circulating pipes? A. It seems to me that they would. X. Q. 24. Does not the Richter patent show and describe a cooling apparatus in which different portions of the apparatus may be independently supplied with cooling water? A. It does. X. Q. 25. Does not the Wigg patent show and describe transverse cooling pipes in an apparatus for making bicarbonate of soda by the ammonia process? A. It does. X. Q. 26. Does not the Gerstenhofer patent show another well-known form of cooling pipes applied to an apparatus for making bicarbonate of soda by the ammonia process? A. It shows a cooling coil of cylindrical form arranged in a vessel described as being designed for use in the ammonia process of making bicarbonate of soda. A cooling coil of that form was well known before this patent."

The great increase in the product effected by the Cogswell apparatus would, in a doubtful case, be evidence of the patentability of the invention, if there had been many inventors at work in the field for a considerable time. But it is to be observed with reference to the asserted difficulty of the problem of cooling the column properly that it was not six months after the Solvay process was put into practical operation in this country, and the difficulties with respect to heating were developed, before Cogswell conceived of this method of avoiding them. The profitable manufacture of soda by the Solvay process had been rendered difficult to the rest of the world by the fact, which is asserted by the complainant company, that there were many secrets needed for a very successful operation of the process, which had been carefully guarded by it. While the patent was in force, therefore, those who would be likely to devise improvements were limited to the small number of licensees. In this country there was but one, and its column was not built till 1883. When it began to be operated, the heating difficulty was presented. The use of the hose and the water jacket on the column were but crude attempts to meet it, which were followed at once by the present system. The experts and counsel for the complainant have involved ingenious theories upon which to base the claim that the apparatus here devised is peculiarly adapted to the Solvay process, and solves the problem in a wonderful way. We cannot think that the problem is so intricate. The question was to reduce the heat of the liquid. It is said that it was to reduce the heat at the proper points. The devising of means by which the temperature of the flowing water should be varied at different parts of the column involved nothing but mechanical skill, and was plainly disclosed in Richter's patent. The questions where the cooler water ought to be introduced, and what the variation in temperatures ought to be, were questions for experiment, and are not answered by anything in the patent. The case is well within the principle laid down in *Stearns & Co. v. Russell*, 54 U. S. App. 591, 29 C. C. A. 121, and 83 Fed. 218, and *Steiner Fire Extinguisher Co. v. City of Adrian*, 16 U. S. App. 409, 8 C. C. A. 44, and 59 Fed. 132, and the cases upon which those decisions rest. The decree of the circuit court is affirmed.

AMERICAN GRAPHOPHONE CO. v. NATIONAL GRAMOPHONE CO. et al.

(Circuit Court, S. D. New York. December 10, 1898.)

PATENTS — INFRINGEMENT — IMPROVEMENT IN RECORDING AND REPRODUCING SPEECH.

The Bell & Tainter patent, No. 341,214, for an improvement in recording and reproducing speech, as to claim 21, covering a loosely-mounted or gravity reproducer, *held* valid and infringed, on motion for preliminary injunction.

Motion for preliminary injunction on United States patent to Bell & Tainter for improvement in recording and reproducing speech, etc., No. 341,214, May 4, 1886.

Richard N. Dyer and Philip Mora, for the motion.
Charles E. Mitchell, opposed.

LACOMBE, Circuit Judge. Although the notice of motion embraces claims 19 to 23, both inclusive, complainant has addressed its argument solely to claim 21. The others may be considered as withdrawn from this application. It is difficult to see upon what theory this court can assume that Judge Shipman, in the case of *Same Plaintiff v. Leeds*, 87 Fed. 873, held the twenty-first claim not to be valid, in view of the fact that the decree in that case expressly declares that the patent is valid so far as that claim is concerned. Nor is there anything in the opinion in the Leeds Case which would require this court to read additional elements into claim 21, thereby making it identical with one or more of the other claims which were also sustained. It seems reasonably clear that this court did not entirely concur with Judge Grosscup. Certainly it held the claim for the loosely-mounted reproducer, or gravity reproducer, or floating reproducer to be valid; and in disposing of the present motion this must be taken as adjudicated, no new evidence of any weight being introduced.

The claim reads as follows:

"(21) The reproducer, mounted on a universal joint, and held against the record by yielding pressure, substantially as described."

Defendants seek to escape infringement upon the theory that the sinuosities in their record which preserve and reproduce the sound waves are found in the walls of the groove, instead of in the bottom; wherefore, as they contend, the reproducer is not held with a yielding pressure against the record, but is moved positively by the side walls. A careful perusal of the patent, however, indicates that the word "record" is not used to indicate solely that particular part of the recording groove whereon the sound waves are recorded by elevations and depressions. Thus, referring to the operation of the reproducer, the specification says:

"No special care is necessary to insure its adjustment; for if the reproducer be allowed to rest against the record, with the style upon the engraved line, the style will of itself gravitate to the bottom of the groove."

And again:

"Difficulties on these accounts are avoided by the loose or flexible mounting of the reproducer, the style automatically adjusting itself to the proper place on the record."

The earlier art shows a reproducer held rigidly. The "floating reproducer" was adapted to put itself in place and keep itself in place despite the various disarrangements of parts to which machines of this class are liable. And in defendants' machine this same automatic action is secured in the same way. Resting always on the bottom of the groove, the reproducer is always in that part of the groove or record—held there by yielding pressure—where it can be acted upon by the irregular surface which preserves the sound waves; and it would seem to make little difference whether that surface was located at the bottom or at the side of the groove, especially in view of the language of the specification:

"The reproducing style, mounted as just explained, is specially adapted for use in connection with a record in the form of a groove with sloping walls, and this combination is specially claimed; but it may also be usefully employed in connection with other forms of record."

There seems to be no special equity in the circumstance that defendants have not heretofore been disturbed by suit. Complainant has evidently been diligent in bringing suits against earlier infringers, and was under no obligation to sue every one at the same time.

Upon formally withdrawing the motion as to the other claims, complainant may take an order in the usual form as to No. 21. After the order is entered, however, its operation will be suspended until January 25, 1899, in order to give defendants an opportunity to prosecute and argue an appeal, if they be so advised.

THE PENOKEE.

(Circuit Court of Appeals, Sixth Circuit. November 14, 1898.)

Nos. 573-575.

MARITIME LIENS—WAGES AND ADVANCES—EVIDENCE.

Evidence considered, and *held* insufficient to satisfy the court of the bonafides of certain claims for wages and advances which were alleged to constitute maritime liens entitled to precedence over a mortgage on the vessel.

Appeal from the District Court of the United States for the Eastern District of Michigan.

Fred C. Harvey, for appellants.

L. M. Huntsberger, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge. Three appeals by intervening libelants have been heard together. They are as follows: First, that of Nettie Lasch, who filed a claim for wages alleged to be due her as cook for the seasons of 1894 and 1895; second, that of Pearl C. Klumph, who intervened to recover wages claimed as due him as seaman for 1894 and 1895; and third, that of William C. Klumph, who has filed a claim for money which he claims was advanced by him for repairs to be made

upon the vessel. The schooner Penokee was sold in the spring of 1894 to Almond P. Klumph, who paid part cash, and executed a mortgage upon the vessel for the remaining purchase money, which was duly recorded. The mortgagor covenanted not to involve the vessel in debt, while the mortgage continued, beyond \$300, and gave a bond with personal security to secure the mortgagee against a breach. The Penokee was sailed during the seasons of 1894 and 1895, by her owner, Almond P. Klumph, as master, and in November, 1895, was libeled for wages and supplies, etc. The mortgagee intervened, and set up the unpaid purchase money so secured by mortgage. The vessel has been sold. Her proceeds are insufficient to pay off the maritime liens allowed as preferences and the mortgagee. The claims of the three appealing libelants were allowed in full by the commissioner to whom they were referred. Exceptions were filed by the mortgagee, which were sustained by the court, so far as to disallow so much of the claims of Nettie Lasch and Pearl Klumph as sought to recover for wages claimed as earned in 1894. The claim of W. C. Klumph was disallowed altogether. The libelants only have appealed.

The record has been carefully read. The owner, Almond P. Klumph, is the father of the two libelants, Pearl and W. C. Klumph, and the friend and intimate of his cook, the libelant Nettie Lasch. It is also shown most conclusively that this owner and mortgagor entertained malicious feelings towards the mortgagees of his vessel. The evidence fails to satisfy us as to the bona fides of any of these claims, and fails to remove the suspicion of a family conspiracy to concoct claims which would prejudice the mortgagee, the mortgagor being insolvent, and his indemnity bond worthless. Making every allowance for the weight to be attached to a commissioner's report where evidence is conflicting, we are unable to see any error in the ruling of the district court upon the exceptions to that report filed by the mortgagee. The evidence is voluminous, and we only deem it necessary to state our conclusions. The decrees appealed from will be affirmed, with costs.

THE TIGER.

(District Court, N. D. California. December 12, 1898.)

No. 11,426.

1. MARITIME LIENS—LACHES OF CLAIMANT—BONA FIDE PURCHASERS.

The question as to what length of delay in proceeding to enforce a maritime lien will constitute laches and bar relief against a bona fide purchaser of the vessel is always one of fact to be determined in view of the particular facts in each case.

2. SAME—FACTS CONSIDERED.

Where a libel to enforce a lien for work against a steam tug was not filed until 17 months after the work was performed, during 10 months of which time the tug had been out of commission, and lying in the harbor of the city where the libelant resided, such delay constituted laches which barred the libelant of relief as against an owner who purchased the tug a few days before the libel was filed, without knowledge of the claim, and knowing that the vessel had been out of service for many months, and who made inquiry of the seller as to liens before the purchase.

This is a libel in admiralty by Michael Aamadt and others against the steam tug Tiger, etc., Sanford Bennett, claimant.

John J. Coffey, for libelants.

Andros & Frank, for respondent.

DE HAVEN, District Judge. This is a suit in admiralty to enforce a lien against the steam tug Tiger for the balance due the libelant for work performed by him on board that boat as carpenter and seaman between the 17th of March, 1896, and the 18th of October of the same year. On March 15, 1898,—13 days prior to the commencement of this action,—the vessel was sold for a valuable consideration to one Bennett, who has appeared as claimant, and made answer to the libel. The defense interposed is that the lien sought to be enforced is barred by reason of the laches of the libelant in failing to take appropriate proceedings to enforce the same before the tug was purchased by, and passed into the possession of, the claimant. It appears from the evidence that for 10 months prior to the 15th of March, 1898, the Tiger was out of commission, and lying in the harbor of San Francisco, and the libelant was during the same time residing in the city of San Francisco. The claimant at the time of his purchase knew that the tug had been out of commission during the period named, and before purchasing inquired of her owners in relation to outstanding liens, and was informed by them that there were none, and he had no notice from any source of the claim of lien sought to be enforced in this action. That upon these facts the claimant must be deemed to be a bona fide purchaser without notice of libelant's asserted lien, does not admit of doubt. He knew that the tug had been out of employment for nearly a year, and was without a master, and in seeking information from the vendors the claimant did all that was reasonably required of him for the purpose of ascertaining what claims were outstanding against the tug. There was nothing whatever in the circumstances attending the transaction to suggest to a man of ordinary prudence the necessity for inquiry from any person other than the vendors. The question, then, arises whether upon these facts the libelant is now entitled to enforce his lien. I am of the opinion that he is not. The lien claimed is maritime in its nature, and such a lien cannot be enforced to the detriment of a bona fide purchaser, when the person in whose favor it exists had a reasonable opportunity to commence proceedings to enforce it before the change of ownership, and neglected to do so. The question as to what length of delay in proceeding to enforce such a lien will constitute laches is always one of fact to be determined in view of the particular facts of each case where the question arises. *The Key City*, 14 Wall. 653. But unreasonable delay will defeat the lien when the rights of a bona fide purchaser have intervened. Thus, in the case of *The Lyndhurst*, 48 Fed. 840, it was sought to enforce a lien for materials furnished about one year before the libel was filed, and more than five months after the vessel had been sold to a bona fide purchaser, and the court, in holding that the lien was lost by laches, said:

"As against a bona fide purchaser who makes all reasonable efforts to discover incumbrances, and fails to find any, such a lien, after a delay of nearly a year to take any steps to enforce it, where the vessel has been all the

time within easy reach of process, and the vendor meantime, as in this case, has become insolvent, is lost through laches. After such ample opportunity to enforce the lien, the loss should fall upon the lienor, and not on the bona fide vendee. The period of limitation of liens in admiralty, as against a bona fide purchaser, is 'a reasonable opportunity to enforce them.' "

So, also, in *The Lillie Mills*, 1 Spr. 307, Fed. Cas. No. 8,352, the same principle was declared in the following language:

"When the rights of third persons have intervened, the lien will be regarded as lost if the person in whose favor it existed has had a reasonable opportunity to enforce it, and has not done so. This is the well-settled rule of the admiralty. The lien for supplies has its origin in the necessities and convenience of commerce and navigation. It is for the interest of navigation and commerce that these liens should exist, and it is equally so that they should not be allowed to extend unnecessarily, to the injury of innocent third persons."

The same rule is also approved in *The Utility*, 1 Blatchf. & H. 218, Fed. Cas. No. 16,806; *The Bristol*, 11 Fed. 156, 20 Fed. 800; *Nesbit v. The Amboy*, 36 Fed. 926. That in this case the libellant had, during the 10 months the *Tiger* was lying in the harbor of San Francisco, ample opportunity to commence proceedings to enforce his lien, cannot well be disputed; and as such lien was latent, and without such action upon his part could not well be known to the public, his delay in filing this libel until after the vessel had been sold to a bona fide purchaser was at his own peril, and operates as a waiver of the lien in favor of such purchaser. The libel will be dismissed, the claimant to recover costs.

MEMORANDUM DECISIONS.

ANTISDEL v. CHICAGO HOTEL CABINET CO. (Circuit Court of Appeals, Seventh Circuit. December 1, 1898.) No. 498. On petition for rehearing. For former opinion, see 32 C. C. A. 216, 89 Fed. 308.

PER CURIAM. It is now here ordered that, in lieu of the words "dismiss the bill," there be inserted in the opinion the words "proceed in accordance with this opinion"; and in the decree of this court there be inserted, in lieu of the words "dismiss the bill," the words "proceed in accordance with the opinion of this court"; and it is further ordered that the petition for rehearing in this cause be, and the same is hereby, denied.

ATWATER et al. v. CASTNER et al. (Circuit Court of Appeals, First Circuit. November 17, 1898.) No. 239. Appeal from the Circuit Court of the United States for the District of Massachusetts. This was a suit to enjoin the infringement of an alleged trade-mark or trade-name in the word "Pocahontas," as applied to coal. The circuit court having made an order granting a temporary injunction, defendants took an appeal, and this court on June 1, 1898, rendered an opinion affirming the order. 32 C. C. A. 77, 88 Fed. 642. The cause is now heard on a petition filed by the appellants, asking that the mandate be recalled and a rehearing ordered. Causten Brown and Jennings

& Morton, for petitioners. Before PUTNAM, Circuit Judge, and WEBB and BROWN, District Judges.

PUTNAM, Circuit Judge. Our opinion on the merits of this appeal was passed down on June 1, 1898, and the judgment in accordance therewith was entered on the same day. A mandate, pursuant to the judgment, issued on June 9, 1898, with the knowledge of the appellants and without objection from them. On September 30, 1898, during the term at which the judgment was entered and the mandate issued, the appellants filed with the clerk, without leave, a petition that the mandate be recalled and that a rehearing be ordered. The proceeding must be governed by the practice as it existed before the adoption at this term of amended rule 29. We have carefully examined the petition and the petitioners' brief, but none of the judges who concurred in the judgment desires that the case be argued anew. The ordinary judgment would be that the petition be denied, but, under the circumstances, the proper and more prudent course is to dismiss it. The petition that our mandate be recalled and a rehearing be ordered is dismissed.

BLUTHENTHAL et al. v. LONG et al. (Circuit Court of Appeals, Fourth Circuit. November 5, 1898.) No. 253. Appeal from the Circuit Court of the United States for the District of South Carolina. Mordecai & Gadsden, for appellants. William A. Barber, Atty. Gen., for appellees. No opinion. Affirmed, with costs.

BOARD OF COM'RS OF DOUGLASS COUNTY v. SAGE et al. (Circuit Court of Appeals, Eighth Circuit. December 6, 1898.) No. 852. Appeal from the Circuit Court of the United States for the District of Kansas. M. Summerfield and George J. Barker, for appellant. W. H. Rossington, Charles Blood Smith, A. L. Williams, and N. H. Loomis, for appellees. Dismissed, pursuant to the twenty-fourth rule, for failure of appellant to file brief.

BOWEN et ux. v. WATKINS. (Circuit Court of Appeals, Sixth Circuit. December 14, 1898.) No. 658. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. Dismissed on motion of appellee.

BROWN et ux. v. UNITED STATES CASUALTY CO. (Circuit Court of Appeals, Sixth Circuit. November 28, 1898.) No. 654. In Error to the Circuit Court of the United States for the Western District of Tennessee. Hill & Jones, J. P. Rhodes, and J. J. Hays, for plaintiffs in error. Natkins & Latimore, for defendant in error. Dismissed on motion of plaintiffs in error, at their costs. See 88 Fed. 38.

CARNEGIE STEEL CO., Limited, v. UNITED STATES MITIS CO. (Circuit Court of Appeals, Third Circuit. October 21, 1898.) Thomas W. Bakewell, for appellant. Jos. C. Fraley, for appellee. No opinion. Affirmed, with costs. See 89 Fed. 206, 343.

CENTRAL PAC. R. CO. v. JOHNSON et al. (Circuit Court of Appeals, Eighth Circuit. December 8, 1898.) No. 1,039. In Error to the Circuit Court of the United States for the District of Utah. C. W. Bunn, L. R. Rogers, David Evans, H. V. Reardon, and William Singer, Jr., for plaintiff in error. B. Howell Jones, for defendants in error. No opinion. Affirmed, with costs.

CENTRAL RAILROAD & BANKING CO. OF GEORGIA et al. v. COLUMBUS IRON-WORKS CO. (Circuit Court of Appeals, Fifth Circuit. November 8, 1898.) No. 642. Appeal from the Circuit Court of the United States for the Southern District of Georgia. A. R. Lawton, J. M. Cunningham, and Marion Erwin, for appellants. Isaac Hardeman, B. M. Davis, and C. M. Turner, for appellee. Dismissed, pursuant to the twentieth rule.

CENTRAL RAILROAD & BANKING CO. OF GEORGIA et al. v. McCANTS. (Circuit Court of Appeals, Fifth Circuit. November 8, 1898.) No. 643. Appeal from the Circuit Court of the United States for the Southern District of Georgia. A. R. Lawton, J. M. Cunningham, and Marion Erwin, for appellants. Isaac Hardeman, B. M. Davis, and C. M. Turner, for appellee. Dismissed, pursuant to the twentieth rule.

CRANE v. EWING. (Circuit Court of Appeals, First Circuit. October 18, 1898.) No. 253. In Error to the Circuit Court of the United States for the District of Massachusetts. Alfred Hemenway and Arthur H. Wellman, for plaintiff in error. Hollis R. Bailey and Lawrence Bond, for defendant in error. Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges. Dismissed, without costs, per stipulation.

Ex parte FRANKLIN MIN. CO. (Circuit Court of Appeals, Sixth Circuit. January 3, 1899.) No. 679. Petition for writ of mandamus. Horace G. Stone and Morison R. Waite, for petitioner. Petition denied.

IRON SILVER MIN. CO. v. SEDAM et al. (Circuit Court of Appeals, Eighth Circuit. December 6, 1898.) No. 778. Appeal from the Circuit Court of the United States for the District of Colorado. Edward O. Wolcott and Joel F. Vaile, for appellant. Dismissed for failure to print record, pursuant to the twenty-third rule.

THE JULIA S. BAILEY. (Circuit Court of Appeals, First Circuit. September 2, 1898.) No. 257. Appeal from the District Court of the United States for the District of Maine. George E. Bird, for appellant. Benjamin Thompson, for appellee. Before COLT, Circuit Judge, and ALDRICH, District Judge. Dismissed, without costs.

MCDougALL v. MOULTON. SAME v. CRAWFORD. SAME v. ABERDEEN BANK. SAME v. BLODGETT. (Circuit Court of Appeals, Ninth Circuit. September 12, 1898.) Nos. 475-478. Appeals from the Circuit Court of the United States for the District of Washington. Ben Sheeks and John C. Hogan, for appellees. Dismissed, with costs, pursuant to the sixteenth rule.

MARBLE v. STEVENSON. (Circuit Court of Appeals, Ninth Circuit. October 3, 1898.) No. 420. Appeal from the Circuit Court of the United States for the Southern District of California. John D. Works and Brander W.

Lee, for appellant. W. P. Gardiner, W. A. Harris, and Willoughby Rodman (Haven & Haven, of counsel), for appellees. Dismissed for failure to print record, pursuant to the twenty-second rule. See 84 Fed. 23.

MICHIGAN CENT. R. CO. v. MURPHY. (Circuit Court of Appeals, Sixth Circuit. December 5, 1898.) No. 581. In Error to the Circuit Court of the United States for the Western District of Michigan. Crane, Norris & Stevens and Ashley Pond, for plaintiff in error. L. A. Tabor, for defendant in error. Dismissed per stipulation.

MOSS v. DOWNMAN. (Circuit Court of Appeals, Eighth Circuit. September 1, 1898.) No. 1,041. Appeal from the Circuit Court of the United States for the District of Minnesota. Appeal to the supreme court of the United States allowed. See 82 Fed. 810; 31 C. C. A. 447, 88 Fed. 181.

NUNEMACHER v. THOMAS et al. (Circuit Court of Appeals, Fifth Circuit. November 8, 1898.) No. 645. Appeal from the Circuit Court of the United States for the Southern District of Georgia. Isaac Hardeman, B. M. Davis, and C. M. Turner, for appellant. Marion Erwin, for appellees. Dismissed, pursuant to the twentieth rule.

THE PHILLIPS EATON. (Circuit Court of Appeals, First Circuit. September 2, 1898.) No. 256. Appeal from the District Court of the United States for the District of Maine. George E. Bird, for appellants. Benjamin Thompson, for appellee. Before COLT, Circuit Judge, and ALDRICH, District Judge. Dismissed, without costs.

In re PUT-IN-BAY WATERWORKS, LIGHT & RAILWAY CO. (Circuit Court of Appeals, Sixth Circuit. May 24, 1898.) No. 619. Petition for a writ of mandamus requiring the Hon. Henry F. Severens, acting as circuit judge, to dismiss the case of Electrical Supply Co. v. Industrial & Mining Guaranty Co., under the decision of this court in 16 U. S. App. 196, 7 C. C. A. 471, and 58 Fed. 732. Foraker, Outcalt, Granger & Prior, for petitioner. William C. Cochran and Parks & Van Campen, opposing. Denied.

SMITH et al. v. GREAT NORTHERN RY. CO. (Circuit Court of Appeals, Ninth Circuit. September 6, 1898.) No. 456. Appeal from the Circuit Court of the United States for the Eastern Division of the District of Washington. W. A. Lewis, for appellants. Will H. Thompson, for appellee. Dismissed, without costs to either party, per stipulation.

STROBEL et al. v. FERST et al. (Circuit Court of Appeals, Fourth Circuit. November 5, 1898.) No. 249. Appeal from the Circuit Court of the United States for the District of South Carolina. William A. Barber, Atty. Gen., for appellants. Mordecai & Gadsden and Howell, Gruber & Bostick, for appellees. No opinion. Reversed, and cause remanded to the circuit court, with instructions to dismiss the complainants' bill; appellants to recover costs in this court.

UNITED STATES v. MAHONEY. (Circuit Court of Appeals, Sixth Circuit, October 5, 1892.) No. 43. In Error to the District Court of the United States for the District of Kentucky. George W. Jolly, U. S. Atty., Samuel McKee, and D. H. Smith, for appellee. Dismissed on motion of appellee.

ZIMMERMANN v. MASONIC AID ASS'N OF DAKOTA. (Circuit Court of Appeals, Eighth Circuit, December 6, 1898.) No. 845. In Error to the Circuit Court of the United States for the District of Nebraska. Charles Ogden, for plaintiff in error. R. S. Hall and J. H. McCulloch, for defendant in error. Dismissed for failure of appellant to print record, pursuant to the twenty-third rule, on motion of counsel for appellee. See 75 Fed. 236.

END OF CASES IN VOL. 90.